No. 05-617 NOV 11 2005



In The
# Supreme Court of the United States

LOUISIANA DEPARTMENT OF EDUCATION, ET AL.,

*Petitioners,*

v.

THEODORE JOHNSON,

*Respondent.*

SUZANNE MITCHELL, ET AL.,

*Petitioners,*

v.

LYNN AUGUST,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can Congress condition federal financial assistance to states upon a waiver of sovereign immunity under the Spending Clause, U S. Const. art. I, §8, cl. 1, and, if so, is 42 U.S.C. §2000d-7(a) of the Civil Rights Remedies Equalization Act unconstitutionally coercive as applied in this case?

2. Under 42 U.S.C. §2000d-7(a) of the Civil Rights Remedies Equalization Act, can a waiver of sovereign immunity ever be knowing and voluntary when, under the jurisprudence at the time of complainant's cause of action and at the time the State accepted financial aid, immunity was already abrogated?

## PARTIES TO THE PROCEEDINGS

LOUISIANA DEPARTMENT OF EDUCATION, ET AL.,

Petitioners,

v.

THEODORE JOHNSON,

Respondent.

**Petitioners:**

Louisiana Department of Education
State of Louisiana
President of the Louisiana State University System
Louisiana Board of Regents
University of New Orleans

**Represented by:**
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**Respondent:**

Theodore Johnson

**Represented by:**
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**PARTIES TO THE PROCEEDINGS** – Continued

**Intervenor:**

The United States of America
Represented by:
The Solicitor General of the United States
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SUZANNE MITCHELL, ET AL.,

Petitioners,

v.

LYNN AUGUST,

Respondent.

**Petitioners:**

Suzanne Mitchell
Mae Nelson
Ed Baras
Department of Social Services for the State of Louisiana

**Represented by:**

Charles C. Foti, Attorney General, State of Louisiana
M. Brent Hicks (La. Bar Roll 23778)
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Lynn August

**Represented by:**

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**PARTIES TO THE PROCEEDINGS** – Continued

**Intervenor:**

The United States of America
Represented by:
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## OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Miller v. Texas Tech University Health Sciences Center c/w Johnson v. Louisiana Department of Education, et al. c/w August v. Mitchell, et al.*, 421 F.3d 342 (5th Cir. 2005) (*en banc*) and is reprinted at App. 1. The panel opinion is reported at *Johnson v. Louisiana Department of Education, et al. c/w August v. Mitchell, et al.*, 330 F.3d 362 (5th Cir. 2005), *opinion vacated*, 343 F.3d 732 (5th Cir. 2003) and is reprinted at App. 19. The District Court opinions that were appealed to the Fifth Circuit are *Johnson v. Louisiana Department of Education, et al.*, 2002 WL 83645 (E.D. La. 2002) which is reprinted at App. 37, and *August v. Mitchell, et al.*, 2001 WL 1160857 (La. E.D. 2001) which is reprinted at App. 60.

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254. The Fifth Circuit's *en banc* decision was issued August 15, 2005.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

> United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. art. I, §8, cl. 1:

> The Congress shall have the power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for a common Defense and general welfare of the United States.

42 U.S.C. §2000d-7(a). Civil Rights Remedies Equalization Act.

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C 1681, *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101, *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C 2000d, *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

29 U.S.C. §794. Nondiscrimination under Federal grants and programs.

> (a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be

submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

## STATEMENT OF THE CASE

### A. Statement of Facts.

#### 1. *Johnson v. Louisiana Department of Education, et al.*

Respondent Theodore Johnson was a full time student at the University of New Orleans ("UNO") receiving financial aid. He is disabled due to a partial paralysis of his left foot. In February 2000, a medical emergency caused Johnson to withdraw from UNO.

UNO revoked Johnson's eligibility for financial aid four months after he withdrew from the university. Johnson successfully appealed the decision; however, the committee imposed academic requirements upon Johnson to maintain his eligibility for financial aid. Johnson was not informed of this decision until after the fall 2000 semester had begun.[1]

Johnson asserts that because of his late start in fall semester classes, he was unable to comply with the academic requirements imposed. In January, 2001 UNO denied Johnson financial aid for the spring semester because he did not meet the academic requirements. Johnson filed suit against the Louisiana Department of Education, the State of Louisiana, the President of the

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[1] *Johnson v. La. Dept. of Ed.*, 330 F.3d 362, 363-364 (5th Cir. 2003), *opinion vacated*, 343 F.3d 732 (5th Cir. 2003), App. 20.

Louisiana State University System, the Louisiana Board of Regents, and UNO under 42 U.S.C. §1983, Title II of the American with Disabilities Act (the "ADA"), and §504 of the Rehabilitation Act (the "Rehabilitation Act"), alleging discrimination against disabled students and failure to provide reasonable accommodations.[2]

**2. *August v. Mitchell, et al.***

Lynn August, a blind man, worked as a computer instructor for the Louisiana Department of Social Services ("DSS"). In June 2000, DSS eliminated August's teaching duties, because August failed to submit "manual materials" required for use in the computer course. August contended, to the contrary, that he submitted the necessary material at the same time as a sighted instructor whose materials were approved. August filed suit against the DSS and three state employees in their official capacities alleging discrimination under 42 U.S.C. §§1981, 1983, the ADA and the Rehabilitation Act.[3]

**3. Facts common to both cases.**

In 2000, when both incidents in question occurred, the jurisprudence in the United States Court of Appeals for the Fifth Circuit, where respondents were located, was clear: a state had to comply with the substantive obligations of the ADA and the Rehabilitation Act regardless of whether it accepted federal aid. Under the law in the Fifth Circuit, states had no immunity to ADA claims, for *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998), *cert.*

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[2] *Id.*

[3] *Id.* at 363-64, App. 21.

*denied*, 525 U.S. 819 (1998), held that Congress had "the authority to abrogate states' immunity" under the ADA. Both the Fifth and Tenth Circuits had characterized *Coolbaugh* as "holding that the entire ADA abrogates state sovereign immunity, not just Title II."[4]

In 2000, the State of Louisiana had to comply with the ADA and Rehabilitation Act regardless of whether it accepted federal aid. Neither acceptance nor rejection of federal aid exposed Louisiana to any new causes of action because *Coolbaugh* held that states were liable for ADA violations, and the substantive requirements of the ADA and the Rehabilitation Act are identical.[5] Because there was no possibility of preserving sovereign immunity by not accepting the funding, sovereign immunity considerations played no role in whether the State of Louisiana or its agencies accepted federal aid in 2000 when these incidents occurred.

After the two incidents occurred and after the suits were filed, the Fifth Circuit reversed *Coolbaugh* in *Reickenbacker*

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[4] *Reickenbacker v. Foster*, 274 F.3d 974, 978 (5th Cir. 2001) (*citing*, *Neinast v. Texas*, 217 F.3d 275, 280, n. 29 (5th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001)); and *Thompson v. Colorado*, 258 F.3d 1241, 1249 n. 4 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002).

[5] The ADA itself states that "[t]he remedies, procedures, and rights" under §504 are also available under the ADA. 42 U.S.C. §12133. Furthermore, Congress amended §504 to expressly incorporate the liability standards of the ADA. *See*, Rehabilitation Act Amendments of 1992, Pub.L. No. 102-569, §506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. §794(d)) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act"). *See also*, *Reickenbacker*, 274 F.3d at 978; and *Thompson*, 258 F.3d at 1249 n. 4.

*v. Foster*, 274 F.3d 974 (5th Cir. 2001),[6] holding that Title II of the ADA and the Rehabilitation Act did not validly abrogate Eleventh Amendment sovereign immunity. A few months earlier, a portion of *Coolbaugh* had been overturned by this Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001), which held that Title I of the ADA did not validly abrogate state sovereign immunity.

It was only after *Garrett* and *Reickenbacker* were decided that Louisiana and its agencies could have known that they could retain their immunity to claims arising under the Rehabilitation Act by not accepting federal aid. However, at this point, in 2001, the cases had already been filed and the states had long since accepted federal aid at the time when *Coolbaugh* was the law.

### B. The District Court Opinions and the Panel Opinion.

The defendants in both *Johnson* and *August* filed motions to dismiss. The district courts dismissed all claims except the Rehabilitation Act claims asserted against the State of Louisiana, its agencies and officers (hereinafter jointly referred to as "Louisiana"). The district courts held that Louisiana waived these claims by accepting federal aid.[7] Louisiana appealed these rulings to the Fifth Circuit under the collateral order doctrine. *See*, *Puerto Rico*

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[6] *Reickenbacker* was partially overruled by *Tennessee v. Lane*, 541 U.S. 509 (2004) as it applies to the right of access to courts. However, this fact does not affect the analysis here.

[7] *See*, *Johnson v. La. Dept. of Ed., et al.*, 2002 WL 83645 (E.D. La. 2002), App. 49; *August v. Mitchell, et al.*, 2001 WL 1160857 (E.D. La. 2001), App. 67.

*Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-45 (1993); *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001) (citing *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 284-85 (5th Cir. 2000)).

Both cases were consolidated on appeal by the Fifth Circuit. Thereafter, the panel reversed the District Court[8] holding that during the period covered by *Johnson* and *August* lawsuits, Louisiana could not have knowingly waived its sovereign immunity.[9] The panel relied heavily upon *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003), *opinion vacated*, 339 F.3d 348 (5th Cir. 2003) ("*Pace I*") in reaching its decision. In *Pace I*, the Fifth Circuit held that prior to *Garrett* and *Reickenbacker*, a state could not knowingly waive its sovereign immunity by accepting federal aid.[10] However, *Pace I* was reversed by the Fifth Circuit in *Pace v. Bogalusa City School Board*, 403 F.3d 272, 285 (5th Cir. 2005) (*en banc*), *cert. denied*, 2005 WL 2493865 (Oct. 11, 2005) ("*Pace II*") as explained below.[11]

### C. The *En Banc* Opinion.

On rehearing *en banc*, the Fifth Circuit consolidated *Johnson* and *August* with *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691 (5th Cir. 2003), *opinion vacated*, 342 F.3d 563 (5th Cir. 2003). The nine-member majority reversed the panel's opinion, holding that Louisiana waived its sovereign immunity because it

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[8] *Johnson*, 330 F.3d 362 (5th Cir. 2003), App. 20.

[9] *Johnson*, 330 F.3d at 365, App. 24.

[10] *Pace*, 325 F.3d at 617.

[11] *Pace II* was pending on the docket of this Court as Case No. 04-1655. Certiorari was denied on October 11, 2005.

knowingly and voluntarily accepted federal financial assistance.[12] The Fifth Circuit relied upon *Pace II*, which reversed *Pace I*.[13] The *en banc* majority found that *Pace II* was controlling and found that for reasons in *Pace II*, the panel decision should be reversed.[14] Similarly, the six-member dissent would have affirmed the panel decision for the reasons cited in the dissent in *Pace II*.[15] The issues presented in *Johnson* and *August* are identical to the issues presented in *Pace II* currently pending before this Court.

## REASONS FOR GRANTING THE WRIT

There are three separate and independent reasons why this writ of certiorari is worthy of being granted. First, the federal government has conditioned receipt of hundreds of millions of dollars in federal aid upon a state's waiver of sovereign immunity, but this Court has never ruled on whether and under what circumstances such conditional waivers can be applied to the states under the Spending Clause. Second, there is a split in the circuits on whether conditions placed upon federal financial assistance are coercive, and, if so, what test should be applied. Third, there is a split in the circuits on whether jurisprudence as well as statutes should be considered in determining a state's notice of conditions placed on federal

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[12] *Miller v. Texas Tech University Health Sciences Center c/w Johnson v. Louisiana Department of Education, et al., c/w August v. Mitchell, et al.*, 421 F.3d 342 (5th Cir. 2005) (*en banc*), App. 17.

[13] *Pace v. Bogalusa City School Board*, 403 F.3d 272, 285 (5th Cir. 2005) (*en banc*), *cert. denied*, 2005 WL 2493865 (Oct. 11, 2005).

[14] *Miller*, 421 F.3d at 352, App. 17.

[15] *Miller*, 421 F.3d at 352, App. 17-18.

financial assistance. These cases squarely present all three questions.

## I. Whether Congress may use its spending power to condition receipt of federal financial assistance upon a waiver of sovereign immunity is a question of exceptional national importance, which has never been addressed by this Court.

This Court has never directly ruled whether Congress, under the Spending Clause,[16] can condition the receipt of federal financial assistance upon a waiver of sovereign immunity and, if so, in what instances. This is a critical issue of national importance, for literally hundreds of millions of dollars in federal funding, grants, and financial aid in a variety of areas are contingent upon a state waiving its sovereign immunity.[17] The question, therefore, is whether the Spending Clause can trump the Eleventh Amendment and, if so, under what conditions.

### A. Congress's recent use of the Spending Clause has eroded State autonomy.

Federal grants to states and localities have increased nearly 40,000% over the past sixty years, growing from $991 million in 1943 to $18.173 billion in 1968 and

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[16] U.S. Const. art. 1, §8, cl. 1.

[17] For instance, acceptance of federal funds under the following spending programs requires waiver of state sovereign immunity: Title IX (20 U.S.C. §1681); Civil Rights Act (42 U.S.C. §2000d-7), which subjects states to suit for accepting funds from the Dept. of Transportation (49 C.F.R. 21.5(b)(12)) and the Dept. of Justice (28 C.F.R. 42.104)); Religious Land Use and Institutionalized Persons Act (42 U.S.C. §2000cc-2(a); IDEA (20 U.S.C. §1403).

$387.281 billion in 2003.[18] While federal financial assistance constitutes an increasingly large portion of each state's revenue, none of this money is offered to states unconditionally.[19] Instead, Congress uses federal financial assistance to achieve numerous policy ends indirectly through the Spending Clause that it could not accomplish directly. For example, Congress has used its Spending Power to prohibit federal contractors from discussing abortion while working at federally-funded health clinics,[20] to ensure that federal funds are not used to support art that is deemed indecent,[21] to achieve a national speed limit,[22] a national drinking age,[23] and numerous other objectives.[24]

Until recently, it had been widely believed that Congress had authority under its Article I powers to abrogate state sovereign immunity. This Court's earlier Commerce Clause decisions had also suggested that Congress could

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[18] *See*, Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970, pt. 2, at 1125 (1943 and 1968 statistics); Statistical Abstract of the United States, 2004-2005, at 266 (2003 statistics) (tbl. 424) (124th ed. 2004-2005) (http://www2.census.gov/prod2/statcomp/documents/CT1970p2-12.pdf).

[19] Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1918 (1995).

[20] *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

[21] *NEA v. Finley*, 524 U.S. 569, 587-88 (1998).

[22] *Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989).

[23] *South Dakota v. Dole*, 483 U.S. 203 (1987).

[24] *See, e.g., Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 846 (1984) (denying federal assistance to students who had not registered for the draft); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding federal legislation prohibiting the use of Medicaid funds for abortions); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (upholding spending restrictions on candidates who receive federal funds).

regulate the states as it chose. It was not until the mid-1990s that this Court began to limit Congress's powers under Article I.

In *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), this Court held that the Gun-Free School Zones Act of 1990 was not a proper exercise of Congress's powers under the Commerce Clause since the Act did not "substantially affect" interstate commerce. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court held that Congress may not use its Article I powers, including the Commerce Clause, to abrogate state sovereign immunity; instead, abrogation can only occur under §5 of the Fourteenth Amendment. Since *Seminole Tribe*, this Court has further limited Congress's ability to abrogate state sovereign immunity under §5 of the Fourteenth Amendment on many occasions.[25]

As a result of these decisions, Congress has become more reliant upon its Spending Power in order to entice States to comply with federal policies. The Spending Clause power, if left unchecked, could destroy state autonomy, a goal that this Court has vigorously pursued as evidenced by its recent jurisprudence. In fact, several members of this Court, several Circuit Court of Appeal Judges[26] and legal commentators[27] have expressed concern

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[25] *See, e.g., Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[26] *See, Jim C. v. U.S.*, 235 F.3d 1079, 1085 (8th Cir. 2000) (*en banc*) (Bowman, Beam, Loken, Bye, dissenting), *cert. denied, Arkansas Dept. of Education v. Jim C.*, 533 U.S. 949 (2001). ("By resort to the spending power . . . Congress could achieve indirectly the same abrogation of Eleventh Amendment Immunity that it could not achieve directly."); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1171 (D.C. Cir. 2004) (Sentelle, dissenting), *cert. denied*, 125 S.Ct.

(Continued on following page)

about Congress's recent expanded use of the Spending power and its effect upon state autonomy.

This Court stated in *New York v. U.S.*, 505 U.S. 144 (1992) that conditions must bear a relationship to the spending programs; otherwise, "the spending power could render academic the Constitution's other grants and limits on federal authority."

Justice O'Conner voiced her concerns in *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) (*quoting*, *United States v. Butler*, 297 U.S. 1, 78 (1936)): "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down

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1591 (2005). ("[i]t is implausible to presume that 'the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers . . . they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" (*citing*, *United States v. Butler*, 297 U.S. 1 (1936)); and *Commonwealth of Virginia Dept. of Educ. v. Riley*, 106 F.3d 559, 570-571 (4th Cir. 1997) (Luttig dissenting), (superseded by statute) ("In the end, this case is about the permissible reach of federal power under the Spending Clause in a time when the several States have become increasingly dependent upon the Federal Government for funds . . . ").

[11] *See*, Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195, 196 (2001). "[T]he greatest threat to state autonomy is, and has long been, Congress's spending power." Baker argues that without revisiting the Court's holding in *Dole*, the Court's sovereign immunity and Commerce Clause jurisprudence will be effectively mooted. Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum. L. Rev. 1911, 1913-14 (1995). *See also*, Coulter M. Bump, *Reviving the Coercion Test: A proposal to prevent federal conditional spending that leaves children behind*, 76 U. Colo. L. Rev. 521 (2005) (arguing that the Court should create effective limits on congressional spending authority).

the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Justice Kennedy, writing on behalf of Chief Justice Rehnquist, Justice Scalia and Justice Thomas, expressed similar concerns in the dissent in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 654-55 (1999), "the Spending Power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between nation and local spheres of interest and power . . . "

This case squarely presents the opportunity to examine the limitations of Congress' ability to enforce policy objectives indirectly through the Spending Clause. Louisiana urges this Court to find that Congress cannot condition substantial funding upon states' waiving their immunity to claims under the Rehabilitation Act.

### B. This Court has never ruled whether Congress may condition federal aid upon a waiver of sovereign immunity.

In *Johnson* and *August*, Louisiana argued that Congress did not have authority under the Spending Clause to condition federal aid upon a waiver of sovereign immunity. Louisiana also asserted this argument in *Pace I* and *Pace II*. In *Pace II*, the *en banc* majority rejected this argument holding that Congress could condition receipt of federal aid upon a waiver of sovereign immunity.[28] Once the Fifth Circuit rejected this argument in *Pace II*, Louisiana conceded before the Fifth Circuit *en banc* that *Pace II* foreclosed on that argument. Louisiana now urges this

[28] *Pace*, 403 F.3d at 287 (*en banc*).

Court to consider the issue, an issue which it has never addressed.

*Pace II* held that as long as the condition imposed meets the test announced in *South Dakota v. Dole*, 483 U.S. 203 (1987), "no independent constitutional bar invalidates," the condition.[29] *Pace II* relied upon *obiter dicta* in *Alden v. Maine*, 527 U.S. 706 (1999) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) in concluding that Congress can condition federal financial assistance upon a waiver of sovereign immunity.[30] However, neither *Alden* nor *College Savings* confronted the question directly.[31]

*Pace II* also relied upon *South Dakota v. Dole* which reaffirmed the general proposition that Congress may attach conditions to its financial grants. However, *Dole* did not involve any attempt to compel the surrender of a constitutional protection, such as sovereign immunity. To the contrary, the Court in *Dole* rejected the idea that the funding condition at issue – raising the minimum drinking age to 21 – infringed on any constitutional prerogative of the States.[32] The Court in *Dole* thus had no occasion to

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[29] *Pace*, 403 F.3d at 287 (*en banc*).

[30] Other circuit courts have relied upon the dicta in *Alden* and *College Savings* to support their holding that Congress has power under the Spending Clause to condition federal aid upon a waiver of state sovereign immunity. *See, Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004); and *A.W. v. The Jersey City Public Schools*, 341 F.3d 234 (3rd Cir. 2003).

[31] Neither *Alden* nor *College Savings* addressed whether the spending power authorized Congress to condition federal aid upon a waiver of immunity.

[32] *Id.* at 209-[illegible].

consider whether, or under what circumstances, Congress could compel the waiver of a constitutional right.

In *Dole*, the Court stated that objectives not thought to be within Congress's power to regulate directly "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[33] However, *Dole* did *not* suggest that Congress may condition receipt of federal financial assistance upon a waiver of a constitutional right such as sovereign immunity. Sovereign immunity was not even at issue in *Dole*.

### C. This Court's unconstitutional conditions doctrine prohibits Congress from conditioning federal aid upon a waiver of immunity.

This Court has held that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996). Just as "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981), a state should have a similar right of Eleventh Amendment immunity. *See, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999).

This Court has applied the unconstitutional conditions doctrine to the right of free speech and the right of lawyers to practice. *See, Federal Communications Commission v.*

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[33] *Id.* at 207.

*League of Women Voters of California*, 468 U.S. 364 (1984) (holding that Congress did not have authority to condition the receipt of federal funds on the waiver of the First Amendment right to speech) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that Congress could not condition funding for legal services to the indigent on lawyers refraining from challenging the constitutionality of federal statutes).

In a series of cases in the mid-nineteenth century, this Court struck down a number of state laws, which required foreign corporations, as a condition of doing business, to submit to the jurisdiction of the state courts. This Court ruled that these state laws were invalid attempts to impose unconstitutional conditions.[34]

Here, the right of sovereign immunity is no less a constitutional right than the right of corporations to conduct business, the right of attorneys to practice law, or the right of free speech. Indeed, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999), the Court found that "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *See also*, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). Accordingly, there is no basis to treat sovereign

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[34] *See, Home Insurance Co. of New York v. Morse*, 20 Wall. 445, 87 U.S. 445 (1874); *Barron v. Burnside*, 121 U.S. 186 (1887); *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922). In two other cases, the Court upheld such laws over vigorous dissents. *See*, *Doyle v. Continental Insurance Co.*, 4 Otto 535, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting); *Security Mut. Life Insurance Co. v. Prewitt*, 202 U.S. 246, 258 (Day, J., dissenting) (1906), but in *Terral*, the Court overruled both *Doyle* and *Prewitt*, and adopted the dissenters' views as its own. *Terral*, 257 U.S. at 533.

immunity any differently than other fundamental constitutional rights.

The Court recently described sovereignty as "the dignity that is consistent with [States'] status as sovereign entities." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). The Court explained that "[t]he founding generation thought it neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty . . . should be summoned as defendants to answer complaints of private persons." *Id.* (citations omitted).

When applying the unconstitutional conditions doctrine, this Court has focused upon the right at issue and not the party challenging the statute. Both the *Pace II* majority and the United States Court of Appeals for the Third Circuit erred by focusing upon the fact that a state as opposed to a private individual was the aggrieved party.[35] This Court has not made such a distinction and has instead focused upon the right at issue. *See*, *Board of County Com'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (where this Court's inquiries focused on the benefit being conferred and the constitutional right at issue). This Court has never limited its inquiry to certain classes of natural or judicial persons. There is no basis to limit this doctrine to exclude states.

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[35] *See*, *Pace*, 403 F.3d at 286; *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161 (3rd Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003). The petition for writ of certiorari filed with this Court in *Koslow* also asserted that the unconstitutional doctrine prohibits Congress from conditioning federal aid on a waiver of immunity. This issue is now ripe for consideration.

Congress cannot condition the receipt of a benefit upon an infringement of a constitutional right. As this Court explained, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981). Yet, this is exactly what Congress does in the Civil Rights Remedies Equalization Act, 42 U.S.C. §2000d-7. These statutes condition the receipt of federal financial assistance upon the requirement that States waive sovereign immunity, a constitutional right. The "unconstitutional conditions" doctrine prohibits this type of condition on federal aid.

The State of Louisiana urges this Court to consider this matter and provide guidance to restore state autonomy, as the Framers of the Constitution envisioned, by holding that Congress cannot condition a substantial benefit (here $800 million dollars in educational funds at issue in *Johnson*) upon the waiver of state sovereign immunity.

## II. On several occasions, this Court has ruled that certain conditions placed upon federal aid may be unconstitutionally coercive; yet, it has not articulated a test resulting in a Circuit split. Here, this Court is given the opportunity to announce a test and resolve the Circuit split.

In *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), this Court recognized that Congress may place conditions upon federal financial assistance, "so long as the condition is not 'coercive'." This Court cautioned that "in some circumstances the financial inducement offered by Congress

might be so coercive as to pass the point at which 'pressure turns into compulsion'." *Id.* (*quoting*, *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

Most recently, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 687 (1999), the Court recognized that coercion continues to be a limitation upon the Spending Power. However, neither *Dole* nor *College Savings* contained a test for courts to apply in determining if a statute is coercive.[36] As a result, the Circuit Courts of Appeal have employed a variety of tests.

### A. A split in the Circuit Courts of Appeal exists concerning how to apply this Court's coercion test.

No uniform approach exists for determining whether a condition placed upon federal financial assistance is unconstitutionally coercive. While some circuit courts of appeal consider the level of funding and the condition placed on those funds, other circuit courts question whether a coercive limitation actually exists, calling such a theory unclear, suspect, and with little precedent.[37] Still, other circuit courts have simply declined "to enter this thicket" as a result of uncertainty.[38] Given the diverse

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[36] The last time this Court held a statute was unconstitutionally coercive was in *United States v. Butler*, 297 U.S. 1, 68 (1936), in which this Court held that the Agricultural Adjustment Act was coercive and violated the Tenth Amendment, because it regulated "agricultural production, a matter beyond the powers delegated to the federal government."

[37] *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000).

[38] *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981).

views of the coercion theory by the Circuit Courts of Appeal, this Court should hear this matter and provide much needed guidance.

Perhaps the Fourth Circuit Court of Appeals is the most favorable for States.[39] In *West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 289 (4th Cir. 2002), the Fourth Circuit found that this Court's "cases have provided little guidance for determining when the line between encouragement and coercion is crossed." As a result, the Fourth Circuit reasoned that "most courts faced with the question have effectively abandoned any real effort to apply the coercion theory."[40] But, the court noted that in this circuit, "the coercion theory is not viewed with such suspicion, but instead has been endorsed by a substantial number of judges on the court, as evidenced by our *en banc* decision in *Riley*."[41] The Fourth Circuit held in *West Virginia* "that the coercion theory remains viable in this circuit, and that federal statutes that threatened the loss of an entire block of federal funds upon a relatively minor failing by a State are constitutionally suspect."[42]

Unlike the Fourth Circuit, the Eighth Circuit has refused to find that the level or amount of funding could constitute impermissible coercion. *See, Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (*en banc*), *cert.*

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[39] *See, Commonwealth of Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*), superseded by statute as stated in *Amos v. Maryland Dept. of Public Safety and Correctional Services*, 126 F.3d 589 (4th Cir. 1997); and *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002).

[40] *Id.* at 290.

[41] *Id.*

[42] *Id.* at 291.

*denied*, 533 U.S. 949 (2001) (holding that $250 million in educational funds or 12% of Arkansas's education budget is not unconstitutionally coercive); *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003) (holding that $557 million or 60% of Nebraska's Department of Social Services budget was not unconstitutionally coercive).

In *Pace II*, the case which foreclosed upon this argument in *Johnson* and *August*, the eight-member majority of the Fifth Circuit took an entirely different approach. The Fifth Circuit explained that "if the clear statement rule is satisfied a State's actual acceptance of clearly conditioned funds is generally voluntary."[43] The Fifth Circuit recognized an exception to this rule "if the spending program itself is deemed 'coercive.'"[44] As the dissent in *Pace II* explained, the test established in the Fifth Circuit is "novel" and has not been adopted by any other circuit.[45] Under the *Pace II* majority's reasoning, the level of funding is irrelevant.

The Ninth and Tenth Circuits found that the coercion theory is suspect. *See*, *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect and has little precedent to support its application."); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997) ("[T]o the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record.")

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[43] *Pace*, 403 F.3d at 279 (*en banc*).

[44] *Id.*

[45] *Pace*, 403 F.3d at 298 (*en banc*). (Jones, Jolly, Smith, Barksdale, Garza and DeMoss, dissenting).

The District of Columbia Circuit has taken yet another approach. *See, Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether states are faced here with an offer they cannot refuse or merely a hard choice . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.")

Given the wide disparity in the way the Circuit Courts of Appeal analyze whether spending conditions are unconstitutionally coercive, this Court should consider this issue and hold that it is unconstitutionally coercive to condition the receipt of substantial federal aid for education upon a waiver of sovereign immunity.

### B. At issue in *Johnson* is whether the Louisiana Department of Education was coerced into waiving its sovereign immunity in order to receive $800 million in education funds.

The Louisiana Department of Education receives three quarters of its annual budget from the federal government – $800 million dollars in 2002 alone. As a condition for accepting this federal aid, the Louisiana Department of Education must "waive" its immunity to claims arising under the Rehabilitation Act pursuant to 42 U.S.C. §2000d-7. The loss of $800 million dollars would be devastating upon Louisiana's primary and secondary education system. Louisiana's school children would suffer severe consequences if Louisiana chose not to accept these funds in order to retain sovereignty.

The dissent in *Pace II* succinctly framed the issue which the State of Louisiana asks this Court to consider

by stating, 'If not now, and on this showing, when, and on what showing' will federal grants be deemed unconstitutionally coercive? . . . To date, the Supreme Court has not found a case that warranted vindication of this principle. Nevertheless, Louisiana and its children would suffer extreme consequences here if the State were to lose massive federal assistance by asserting its constitutional right to sovereign immunity."[46]

The dissent in *College Savings*, 527 U.S. at 697 (Breyer, J., Stevens, J., Souter, J., and Ginsburg, J., dissenting) agreed that "[i]t is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children . . . " than was the condition at issue in *College Savings*. Here, over 800 million dollars that would be used by the Louisiana Department of Education for education purposes is at issue in *Johnson*. If, as the *College Savings* dissent contends, the condition here is more coercive than the condition at issue in *College Savings*, then the condition must be unconstitutionally coercive. Here, the consequences upon Louisiana's school children would have been so severe that Louisiana had no choice but to waive its immunity.

In *Dole*, this Court found that conditioning 5% of highway grant funds upon a condition that South Dakota raise its drinking age to 21 was not coercive. The choice that South Dakota was faced with was relatively minor compared to Louisiana's choice. Here, 42 U.S.C. §2000d-7 has conditioned 75% of the Louisiana Department of Education's budget (a total amount of federal aid being

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[46] *Pace*, 403 F.3d at 301, n. 2, (en banc) (Jones, Jolly, Smith, Barksdale, Garza and DeMoss, dissenting).

$800 million dollars) upon waiver of sovereign immunity. Unlike *Dole*, where a mere 5% of the highway budget was at issue, Louisiana had no choice – waive immunity or suffer dire consequences for Louisiana's school children.

Here, a finding of coercion is proper, based on "robust common sense"[47] and a review of the total impact of all of the coercive factors involved, including:

- the total federal dollar amount involved ($800 million) and its percent (75%) in relation to the budget of the Louisiana Department of Education;
- 42 U.S.C. §2000d-7 conditions all federal funds a state department receives upon waiver of immunity;[48]
- 42 U.S.C. §2000d-7 and 20 U.S.C. §1403(a) encompasses federal regulation of education, which is a Tenth Amendment core function of the State;[49] and
- 42 U.S.C. §2000d-7 and 20 U.S.C. §1403(a) condition federal financial assistance upon the waiver of a fundamental constitutional right – sovereign immunity.[50]

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[47] *Steward Machine Co.*, 301 U.S. at 590.

[48] *See, Jim C.*, 235 F.3d at 1081; *Koslow*, 302 F.3d at 171 (holding that the waiver of immunity in 42 U.S.C. §2000d-7 applies to an entire state department if it accepts federal financial assistance).

[49] *See, e.g., Honig v. Doe*, 484 U.S. 305, 309 (1988) ("[E]ducation [is] 'perhaps the most important function of state and local governments.'" (*quoting, Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954))); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . "); *United States v. Lopez*, 514 U.S. 549, 564 (1995) ("[Education is an area] where States historically have been sovereign.")

[50] *See*, Section I, *supra*.

After all relevant factors are considered, the conclusion is inescapable. Louisiana could not, as a practical matter, afford to forfeit all federal education funds in order to retain its sovereign immunity. Where substantial education funds are concerned, the "choice becomes impossible" and the waiver conditions imposed by Congress are unconstitutionally coercive.

Louisiana asks this Court to grant the writ and, following the mandate of *Dole*, rule that it is unconstitutionally coercive to condition federal aid that constitutes a substantial sum of federal educational funds, forming more than two-thirds of the budget, upon a state's waiver of immunity.

## III. A split in the circuits exists concerning how courts should determine whether a state has notice of the conditions placed upon federal financial assistance.

Given the frequency with which Congress uses the Spending Power to impose policy objectives upon states, and states' dependency upon federal aid, conditions placed upon federal aid is an issue of national significance.[51] Yet, a split in the circuits exists concerning what type of notice recipients must receive of those conditions. While this Court has ruled that jurisprudence plays as much a role in notice as the statutory language itself, some circuits do not consider jurisprudence.[52]

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[51] *See*, Section I, *supra*.

[52] "[T]hus, the board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX private causes of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497, 1509 (2005).

This Court has reiterated many times that when Congress invokes the Spending Clause and places conditions upon States' acceptance of federal financial assistance, Congress "must speak with a clear voice," and do so "unambiguously" in order to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).[53]

Just this term, this Court confirmed the *Pennhurst* test by stating, "[a]s we have recognized that, '[t]here can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds]'." *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497 (2005) (*citing*, *Pennhurst*, 451 U.S. at 17).

In *Jackson*, this Court found, based upon the jurisprudence, that "a reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation." *Id.* at 510. This Court extensively considered its prior opinions to find notice of this condition.

The *Miller* majority held that, "nothing in *Jackson* undermines *Pace II's* holding."[54] However, the *Pace II* rationale cannot be squared with *Jackson*, for *Pace II* found irrelevant any consideration of the jurisprudence.[55]

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[53] In *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), this Court held that the ability of Congress to legislate under the Spending Clause is similar to a contract: "[j]ust as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of congress' power to legislate under the Spending Power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'"

[54] *See, Miller*, 421 F.3d at 352 (*en banc*), App. 17.

[55] *Pace*, 403 F.3d at 284 (*en banc*).

In fact, the *en banc* majority crafted a test for notice unlike any other circuit. It held that "under *Dole*, if the clear-statement requirement is met, the state is conclusively presumed to have 'known' that receipt of clearly conditioned federal funds requires the state to abide by the condition (i.e., waiver of Eleventh Amendment immunity)."[56] By applying this new test, the court held that Louisiana knowingly waived its immunity when it accepted federal financial assistance without considering the effect of jurisprudence upon notice of the conditions.

In *Miller*, Louisiana argued that the effect of jurisprudence upon knowledge had to be considered in light of *Jackson*. The Fifth Circuit rejected this argument holding that Louisiana had notice of 42 U.S.C. §2000d-7's condition because it was clear and unambiguous.[57] The Fifth Circuit refused to consider the effect which its prior decision in *Coolbaugh* may have had on this notice.[58] Instead the Fifth Circuit presumed that Louisiana had notice of the condition based upon the language of the statute and refused to consider jurisprudence even when a reading of the jurisprudence reflected a different meaning.

The Fifth Circuit's *presumption* of knowledge conflicts with both *Jackson*, and *Dole* and is not consistent with other circuit court opinions. Furthermore, *Jackson* cannot be distinguished through a claim that the statute there was ambiguous while the statute here was clear. When there is applicable and binding jurisprudence, that jurisprudence must be consulted to determine the impact of the

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[56] *Pace*, 403 F.3d at 284 (*en banc*).

[57] *Miller*, 421 F.3d at 352 (*en banc*), App. 16.

[58] *Id.*

statutory language.[59] *Coolbaugh* squarely held that Louisiana had no sovereign immunity to reserve. In light of *Coolbaugh* the state's acceptance of funds could not have been a "knowing" or "voluntary" waiver, for even if the state had rejected federal funds it would have had no immunity. To simply bypass the importance of *Coolbaugh*, as the majority of *Pace II* and *Miller* did, is to ignore the most basic interpretative tool courts have – the principal of *stare decisis*.

Not only is the Fifth Circuit's decision in *Pace II* and *Miller* not consistent with *Jackson* but there are also decisions from the District of Columbia Circuit in *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004)[60] and the Third Circuit in *A.W. v. The Jersey City Public Schools*, 341 F.3d 234 (3rd Cir. 2003), which cannot be squared with *Jackson*. These circuits also did not consider the effect of the jurisprudence upon notice.

The Circuit Courts of Appeal are split on the proper analysis to employ in determining whether a state has notice of waiver requirements. The Second Circuit, in *Garcia v. S.U.N.Y. Health Services Center*, 280 F.3d 98 (2nd Cir. 2001), is in accord with the earlier panel decisions in *Pace I and Johnson* in holding that a state could

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[59] *See, Jackson*, 125 S.Ct. 1497 (considering the Court's prior interpretations of Title IX); *Davis v. Monroe County Board of Education*, 526 U.S. 629, 659 (1999) (finding that a claim for deliberate indifference to sexual harassment exists under Title IX based upon prior interpretations of discrimination).

[60] This Court refused to grant a petition for writ of certiorari in *Barbour* which sought review of a similar issue presented here. *See, Washington Metro. Area Transit Auth. v. Barbour*, 125 S.Ct. 1591 (2005).

not knowingly waive immunity which had already been abrogated. Both of these courts considered the applicable jurisprudence affect upon notice to the states. After considering the jurisprudence upon notice these courts held that the recipient could not have known of the conditions placed upon federal financial assistance. This same argument was rejected by the *en banc* decision in *Miller* and *Pace II*.

This Court's requirements of notice and knowing acceptance are heightened in cases such as this where Congress seeks to condition a waiver of the fundamental right of sovereign immunity upon receipt of federal financial assistance. "[E]very reasonable presumption against waiver must be indulged" as courts "do not presume acquiescence to the loss of fundamental rights." *College Savings Bank*, 527 U.S. at 682 (citations omitted). "Only if the totality of the circumstances . . . reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the . . . rights have been waived." *See*, *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

"The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank*, 527 U.S. at 682. "[W]aiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. at 421 (1986).

When this Court's jurisprudence concerning waiver of fundamental rights is considered in connection with this Court's jurisprudence concerning notice of conditions, it is clear that the relevant jurisprudence cannot be ignored when determining notice. Many circuits do not take into account jurisprudence when considering notice. Louisiana

urges this Court to consider this issue and provide instruction to the circuits that they should consider how jurisprudence affects notice of conditions placed upon federal aid.

## CONCLUSION

This case presents for decision an important evolving question of constitutional law that directly affects claims and potential claims that may be asserted against all states. The Court has an opportunity to squarely address whether Congress may use its spending power to condition a waiver of sovereign immunity upon receipt of federal financial assistance. The Court is also squarely presented with an opportunity to rule whether *Dole's* statement about coercion is to be given substance by the creation of a test to measure coercion or whether it is to remain mere language that lower courts can always find not applicable, without reliance upon any test.

Respectfully submitted,

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2005 WL 1950352

United States Court of Appeals,
Fifth Circuit.
Lucinda G. MILLER, Elaine King-Miller,
Plaintiffs-Appellees,
v.
TEXAS TECH UNIVERSITY HEALTH SCIENCES
CENTER, Defendant-Appellant.
Theodore Johnson, Plaintiff-Appellee,
v.
Louisiana Department of Education, et al., Defendants,
Louisiana Department of Education; State of Louisiana;
President of Louisiana State University System;
Board of Regents, Defendants-Appellants.
Lynn August, Plaintiff-Appellee,
v.
Suzanne Mitchell; Mae Nelson; Ed Barras, Department
of Social Services, for the State of Louisiana,
Defendants-Appellants.
**Nos. 02-10190, 02-30318 and 02-30369.**

Aug. 15, 2005.

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Appeal from the United States District Court for the Northern District of Texas.

Appeals from the United States District Court for the Eastern District of Louisiana.

*ON PETITION FOR REHEARING EN BANC*

Before KING, Chief Judge and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT and PRADO, Circuit Judges.*

W. EUGENE DAVIS and WIENER, Circuit Judges:

This consolidated appeal presents the same issue we recently resolved en banc in *Pace v. Bogalusa City School Board*[1]: Does a state waive its Eleventh Amendment immunity from suit in federal court under § 504 of the Rehabilitation Act of 1973[2] when it accepts federal funds that are granted by Congress under authority of the Constitution's Spending Clause and expressly conditioned

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* Judge Owen was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

[1] 403 F.3d 272 (5th Cir.2005) (en banc).

[2] 29 U.S.C. § 794.

on waiver of immunity from § 504? For reasons that follow, we find no merit in appellants' arguments and reaffirm our conclusions in *Pace* that acceptance of such federal funds operates to waive a State's Eleventh Amendment immunity under the express conditions of 42 U.S.C. § 2000d-7.[3]

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[3] The factual and legal background of this consolidated appeal is accurately and succinctly presented in the panel opinions:

> A. *Johnson/August v. Louisiana Dep't of Education*, 330 F.3d 362, 363-364 (5th Cir.2003).
>
> Appellee Johnson was a full time student at the University of New Orleans ("UNO") on financial aid. He is disabled by a partial paralysis of his left foot. In February 2000, a medical emergency caused Johnson to withdraw from UNO. Four months later, UNO revoked Johnson's eligibility for financial aid. Johnson successfully appealed the decision. The appeals committee, however, did not inform Johnson of its decision until after the fall 2000 semester had begun; the committee also imposed academic requirements to maintain his eligibility for financial aid. Johnson asserts that because of his late start in fall semester classes, he was unable to comply with the academic requirements. In January 2001, UNO denied Johnson financial aid for the spring semester. Johnson filed suit against the Louisiana Department of Education, the State of Louisiana, the President of the Louisiana State University System, the Louisiana Board of Regents, and UNO under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act, alleging discrimination against disabled students and failure to provide reasonable accommodations. [Lynn] August, a blind man, worked as a computer instructor for the Louisiana Department of Social Services ("DSS"). In June 2000, DSS eliminated August's teaching duties, averring that August failed to submit "manual materials" required for use in the computer course. August contended . . . that he submitted the necessary material at the same time as a sighted instructor whose materials were approved. August brought various claims for damages against the DSS and the three

(Continued on following page)

## I. BACKGROUND

Louisiana's Department of Education ("LADOE")and Department of Social Services ("DSS")[4] and Texas Tech University Health Sciences Center ("TTUHSC") (collectively "defendants") appeal rulings by district courts which held that, by accepting federal funds offered on explicit conditions of waiver, defendants in fact waived their right to Eleventh Amendment[5] immunity pursuant to 42 U.S.C.

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state employees in their official capacities, including claims under the ADA and the Rehabilitation Act (§ 504).

Separate district courts in the Eastern District of Louisiana dismissed all claims against the defendants based on state sovereign immunity except for those under § 504 of the Rehabilitation Act. The defendants appeal, arguing that state sovereign immunity bars the appellees' § 504 claims.

B. *Miller v. Texas Tech University Health Sciences Center,* 330 F.3d 691, 691 (5th Cir.2003).

King Miller began working as an administrator and professor at [Texas] Tech in 1997. She notified Tech that she suffered from a degenerative eye condition in August 1998; she was diagnosed as legally blind in 1999. In 2000, she sued Tech for allegedly failing to accommodate her disability in violation of § 504, which prohibits discrimination against the disabled by programs receiving federal funds.

. . . Tech moved to dismiss on the basis of state sovereign immunity. The district court denied the motion, and Tech took this interlocutory appeal.

[4] The case before the panel in *Johnson* was a consolidated appeal by LADOE and the Department of Social Services for the State of Louisiana ("DSS"). LADOE and DSS consolidated their arguments into one brief for this rehearing en banc, and therefore all arguments accredited to LADOE are also made on behalf of DSS.

[5] The Eleventh Amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

(Continued on following page)

§ 2000d-7,[6] and were therefore amenable to suit in federal court for § 504 violations. Later, a panel of this court in *Pace v. Bogalusa City School Board*[7] ("*Pace I*") held that, despite the express provision in the grant that entitlement of the grantee to accept the funds was conditioned on such a waiver, a State did not waive Eleventh Amendment immunity from suit under § 504 by accepting federal funds at a time when, based on the then-current state of the pertinent case law, the State had reason to believe that it had no such immunity to waive. Two panels of this court, relying on *Pace I*, reversed the district courts' denials of Eleventh Amendment Immunity and dismissed the plaintiffs' claims under § 504.[8]

We later reheard *Pace* en banc and held that, then as now, a State did waive Eleventh Amendment immunity from suit under § 504 by accepting federal funds under such circumstances ("*Pace II*").[9] Prior to rehearing *Pace* en banc, we had agreed to rehear the instant cases en banc,

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another State, or by Citizens or Subjects of any Foreign State.

[6] Section 2000d-7 (a)(1) provides in pertinent part:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

[7] 325 F.3d 609 (5th Cir.2003).

[8] *See Miller v. Tex. Tech Univ. Health Sciences Ctr.*, 330 F.3d 691 (5th Cir.2003) and *Johnson v. La. Dept. of Educ.*, 330 F.3d 362 (5th Cir.2003).

[9] *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.2005) (en banc).

but postponed rehearing them pending our decision in *Pace II*.

After *Pace II* was announced, we asked the parties in these cases to submit supplemental briefs explaining which of their arguments regarding Eleventh Amendment immunity from suits under § 504 remained viable and which had been foreclosed. In response, the defendants conceded that *Pace II* forecloses all their arguments except three.

First, both LADOE and TTUHSC contend that no valid waiver of Eleventh Amendment immunity occurred because, even though they received federal funds, none of the state agencies was *expressly authorized* by state law to waive its respective state's immunity from suit under § 504. Second, TTUHSC contends that *Pace II* did not address the issue whether § 504 and § 2000d-7 place conditions on federal funds that are not *reasonably related* to the purpose of the expenditure, which is part of the test for valid Spending Clause legislation set forth by the Supreme Court in *South Dakota v. Dole*.[10] Third, LADOE asserts that it did not "knowingly waive" Eleventh Amendment immunity under § 2000d-7 by accepting federal funds, contending that this argument, although rejected in *Pace II*, should be reexamined in light of the Supreme Court's subsequent decision in *Jackson v. Birmingham Board of Education*.[11]

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[10] 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

[11] ___ U.S. ___, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005).

## II. STATE IMMUNITY UNDER THE ELEVENTH AMENDMENT

### A. *Express Authority to Waive Immunity*

We consider first defendants' argument that they did not waive their states' Eleventh Amendment immunity from suit under § 504 because they lacked express authorization to do so under state law. Defendants do not challenge that they were authorized under state law to *accept* federal funds or that each received federal funds.[12] Defendants insist, however, that as state agencies, their authority to *accept* federal funds is insufficient to waive Eleventh Amendment immunity, which, they argue, cannot be validly waived without *express* statutory authority.

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[12] LADOE is authorized to accept federal funds pursuant to La.Rev.Stat. Ann. § 17:24(C), which provides in pertinent part:

> The board [LADOE] is hereby *designated* as the *State Agency* with respect to federal funds for those programs under the jurisdiction of the board. The State Department of Education shall administer and distribute all federal funds received for the benefit of those phases of education under the jurisdiction of the board. (Emphasis added).

Similarly, La.Rev.Stat. Ann. § 46:51(6) provides that the Department of Social Services of Louisiana [DSS] may "*[a]ct as the agent* of the state to cooperate with the federal government . . . and in the administration of federal funds granted in the state to aid in the furtherance of any functions of the department, *and be empowered to meet such federal standards* as may be established for the administration of such federal funds." (Emphasis added).

Likewise, Tex. Educ.Code. Ann. § 110.08, which governs the funding of TTUHSC, provides in pertinent part, "The board [of TTUHSC], in its discretion, may accept and administer grants and gifts from the federal government . . . for the use and benefit of the Health Sciences Center."

Defendants' argument fails to recognize that grant programs based on the Spending Clause are to be interpreted under ordinary contractual principles.[13] In these cases, the defendants were authorized by the State to accept the benefits of substantial sums of federal Spending Clause money burdened with the clearly stated condition under § 2000d-7 that acceptance waives immunity from suit in federal court. The statutory powers of attorney provided to defendants by their respective state legislatures to accept, administer, and expend such federal funds necessarily includes the authorization to accept the conditions that come along with those funds. Clothed with this authority, the defendants held themselves out to have authority from their states to comply with the conditions imposed by Congress in the statute. These conditions are inseparable from the offer of the funds: The States (or their authorized agencies) may reject the condition of waiver of Eleventh Amendment immunity by rejecting the funds, or they may accept the funds and the conditions; they cannot, however, accept the benefits of the funds and reject the inextricably intertwined condition of waiver by claiming *post hoc* that the delegation of authority to accept the funds did not carry with it the authority to waive immunity. This is hornbook contract and agency law.

Therefore, we reject defendants' argument that they retain Eleventh Amendment immunity because they lacked express statutory authority to waive their states' Eleventh Amendment immunity.[14]

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[13] *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

[14] This disposition makes it unnecessary for us to consider what effect the Supreme Court's decision in *Lapides v. Board of Regents of the*

(Continued on following page)

*B. Relatedness*

We next address TTUHSC's argument that § 504 and § 2000d-7 are unconstitutional Spending Clause legislation because they place conditions on federal grants that are not *reasonably related* to the purpose of the expenditure. This is often referred to as the "relatedness" prong of the *Dole* test for valid Spending Clause legislation.[15] According to TTUHSC, they are not governed by § 504 because none of the federal funds they received were earmarked for § 504 goals of preventing disability discrimination or accommodating disability. TTUHSC urges that, if we determine that the immunity waiver condition imposed by § 504 is not limited to Rehabilitation Act funding but that they accompany all federal funding, we should hold that § 504 fails the "relatedness" prong of the *Dole* test.

TTUHSC failed to raise this argument in its briefs before either the district court or the original panel of this court. Neither did it argue the point in its original en banc brief. In *Pace II,* we concluded that the state defendant had waived this "relatedness" argument because it failed to argue the point before the original panel and did not argue it in its en banc brief beyond a bare assertion.[16] The maxim is well established in this circuit that a party who

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*University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) has on this issue.

[15] Under *Dole*, conditions attached to Spending Clause legislation are only valid if they are (a) attached to expenditures that benefit the general welfare; (b) unambiguous; (c) reasonably related to the purpose of the expenditure to which they are attached; and (d) not in violation of an independent constitutional provision. 483 U.S. at 207-208, 107 S.Ct. 2793.

[16] 403 F.3d at 281 n. 32.

fails to make an argument before either the district court or the original panel waives it for purposes of en banc consideration.[17]

If we are required to address this argument because it relates to Eleventh Amendment immunity, and as such may be a "jurisdictional" defense that cannot be waived,[18] we reject it. We agree with the four circuit courts that have addressed this issue and concluded that, if the involved state agency or department accepts federal financial assistance, it waives its Eleventh Amendment immunity even though the federal funds are not earmarked for programs that further the anti-discrimination and rehabilitation goals of § 504.[19] Chief Judge Scirica's persuasive opinion for the Third Circuit in *Koslow* is particularly helpful in explaining this point.

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[17] *See Communication Workers of America v. Ector County*, 392 F.3d 733, 748 (5th Cir.2004) (failure to brief an issue constitutes waiver on appeal); *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir.2004) (party waived argument not included in original brief to panel); *Cooper Ind. v. Tarmac Roofing, Inc.*, 276 F.3d 704, 711 (argument not raised before original panel waived); *and Lowry v. Bankers Life and Cas. Retirement Plan*, 871 F.2d 522, 525 (5th Cir.1989) (refusing to consider an argument raised for the first time in a petition for rehearing). *See also* Fed. R.App. P. 28(a)(9)(A) which states that an appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

[18] *See Edelman v. Jordan*, 415 U.S. 651, 677-678, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (because defense of Eleventh Amendment immunity is a jurisdictional bar to the plaintiff's suit, court of appeal did not err in considering defense when it was not argued before the district court).

[19] *See Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C.Cir.2004); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir.2002); *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161 (3d Cir.2002); *Jim C. v. United States, Atkins School District*, 235 F.3d 1079 (8th Cir.2000) (en banc).

In that case, the State of Pennsylvania received federal financial assistance for the State Criminal Alien Assistance Program, established to alleviate costs states incur in imprisoning illegal aliens who commit state offenses.[20] The state furnished these funds to the Pennsylvania Department of Corrections.[21] The plaintiff, Mr. Koslow, was employed by the Department of Corrections as a supervisor at the prison's water treatment plant and brought a § 504 suit against his employer for failing to accommodate his disability following a work related injury.[22]

The state defendants argued that the federal government's interest in the federally funded program was too attenuated from the general waiver of immunity set forth in § 2000d-7 respecting claims under § 504. The *Koslow* court disagreed and concluded that receipt of federal funding by an agency operated as a waiver of that agency's Eleventh Amendment immunity even though the funds are not earmarked for § 504 purposes. The court gave three reasons for its conclusion. First, the panel found that:

> [t]hrough the Rehabilitation Act [§ 504], Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies. That interest, which is undeniably significant and clearly reflected in the legislative history, flows with every dollar spent by a department or agency receiving federal funds. The waiver of the Commonwealth's

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[20] *Koslow*, *id.* at 166-167.

[21] *Id.* at 167.

[22] *Id.* at 165.

> immunity from Rehabilitation Act claims by Department of Corrections employees furthers that interest directly.[23]

Second, § 2000d-7 limits the waiver to the agency or department that receives federal funds and does not require waiver by other agencies or the state as a whole.[24] The court concluded that "[t]his limitation helps ensure the waiver accords with the 'relatedness' requirement articulated in *Dole*."[25]

Finally, the court observed that, as a practical matter, § 504 funds received by specific state departments or agencies are frequently not tracked, making it virtually impossible to determine how the agency spent the federal dollars and whether the federal funds paid for the affected employee's salary or benefits.[26]

For the same reasons articulated in *Koslow*, we reject the TTUHSC's argument that the substantial federal financial assistance for education it received is unrelated to the goals of § 504 and therefore fails *Dole*'s "relatedness" requirement.

### *C. Jackson v. Birmingham Board of Education*

Finally, LADOE argues that it did not "knowingly" waive Eleventh Amendment immunity from suit in federal court under § 504 in accordance with § 2000d-7 by accepting federal funds. As LADOE acknowledges, this argument

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[23] *Id.* at 175-176. (internal citation omitted).

[24] *Id.* at 176.

[25] *Id.*

[26] *Id.*

was considered and rejected by our en banc majority in *Pace II*.[27] LADOE nevertheless argues that the Supreme Court's decision in *Jackson v. Birmingham Board of Education*,[28] requires us to re-examine the issue, repudiate the reasoning of *Pace II*, and adopt the analysis of *Pace I*. In *Pace I*, the panel held that the state defendant did not "knowingly" waive its Eleventh Amendment immunity by accepting federal funds because, at the time it received those funds, the prevailing legal authorities suggested that it had no Eleventh Amendment immunity from suits under § 504.[29]

In rejecting the *Pace I* panel's syllogism, the en banc court in *Pace II* held that, in accordance with *Pennhurst State School & Hospital v. Halderman*,[30] "the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, *not* a state's knowledge that it has immunity that it could assert."[31] We also stated in *Pace II* that, "[a]t bottom . . . if Congress satisfies the clear statement rule, the knowledge prong of the Spending Clause waiver analysis is fulfilled."[32] Finding that § 504 and § 2000d-7 clearly and unambiguously conditioned the receipt of § 504 funds on waiver of a State's Eleventh Amendment immunity from suits grounded in § 504, we held that the State

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[27] 403 F.3d at 282-285.

[28] ___ U.S. ___, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005).

[29] 325 F.3d at 617.

[30] 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

[31] *Pace II*, 403 F.3d at 279 (emphasis in original); *see also Dole*, 483 U.S. at 207, 107 S.Ct. 2793 (quoting *Pennhurst*).

[32] *Pace II*, *id.*

had "knowingly waived" immunity from suits under § 504.[33]

LADOE does not argue that § 504 and § 2000d-7 fail the "clear statement rule" of *Pace II;* rather LADOE contends that in *Jackson* (decided after *Pace II*) the Supreme Court repudiated this "clear statement rule" and replaced it with a "notice" rule. In *Jackson,* the male coach of a high school's girls basketball team asserted a retaliation claim against the local school board, grounding his claim in Title IX. The school board argued that, because retaliation claims are not expressly authorized by the language of Title IX, it was not put on notice of the potential for retaliation claims under the statute.[34]

The Supreme Court agreed that, because Title IX was passed pursuant to the Spending Clause, "private damage actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue."[35] Consonant with its holding in *Pennhurst,* the Court reiterated its position that a State must be aware of the conditions imposed on receipt of federal funds for there to be "knowing acceptance" of those conditions.[36] Acknowledging that Title IX is silent on the question of the fund recipient's amenability to retaliation suits, the Court looked to its prior decisions dealing with the scope of remedies available under Title IX and concluded (in the absence of a "clear statement") that the school board nevertheless had sufficient "notice" because:

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[33] *Id.* at 282-285.

[34] *Jackson,* 125 S.Ct. at 1508-09.

[35] *Id.* (internal citation omitted).

[36] *Id.* at 1509 (quoting *Pennhurst,* 451 U.S. at 17, 101 S.Ct. 1531).

> [T]he Board should have been put on notice by the fact that our cases since *Cannon* [*v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)], such as *Gebser* [*v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998)] and *Davis* [*v. Monroe County Bd. of Ed.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)], have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination.[37]

LADOE would have us read *Jackson* as the Court's abandoning of *College Savings Bank*'s "clear statement rule" that we applied in *Pace II* and replacing it with a "notice" test of what the recipients of the funds should have known at the time the funds were accepted. We cannot read such a sweeping change into the court's opinion in *Jackson*. Title IX, the statute at issue in *Jackson*, is silent (or at least ambiguous) regarding retaliation; in contrast, the Spending Clause statutes we addressed in *Pace II* were clear and unambiguous regarding waiver: Section 2000d-7 expressly and unambiguously states that parties waive their Eleventh Amendment immunity to actions under § 504 by accepting federal funds. Moreover, there is no language in *Jackson* that can be pointed to in support of a conclusion that the Court desired to modify, much less repudiate, the well-established rule with such a long and distinguished history laid out in *Pennhurst, Dole*, and *College Savings Bank* that "if Congress intends to impose a condition on the grant of federal moneys," "it must do so unambiguously" and "speak with a clear

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[37] *Id.*

voice."[38] Stated differently, nothing in *Jackson* undermines *Pace II*'s holding that a clear statement like the one found in § 2000d-7 is sufficient to satisfy the "knowing" requirement for a waiver to be valid. Even if *Jackson* can be interpreted as standing for the proposition that a clear and unambiguous statement from Congress is not the exclusive road to a "knowing waiver," it cannot be read to call into question the holding in *Pace II* that the presence of a clear statement is sufficient to satisfy the need for a waiver to be "knowing." Accordingly, LADOE's *Jackson* argument in this regard fails.

## III. CONCLUSION

We hold that LADOE, DSS, and TTUHSC are not entitled to Eleventh Amendment immunity in these consolidated cases. We therefore affirm the district courts' denials of defendants' motions to dismiss plaintiffs' claims under § 504 on the basis of such immunity, and we remand the cases to the district courts from whence they came for further proceedings.

AFFIRMED AND REMANDED.

EDITH H. JONES, Circuit Judge, joined by E. GRADY JOLLY, JERRY E. SMITH, EMILIO M. GARZA, DeMOSS and EDITH BROWN CLEMENT, Circuit Judges, concurring in part and dissenting in part:

The en banc decision in *Pace v. Bogalusa City School Board,* 403 F.3d 272 (5th Cir.2005), held that a state

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[38] *Pennhurst,* 451 U.S. at 17, 101 S.Ct. 1531; *see also Dole,* 483 U.S. at 207, 107 S.Ct. 2793.

voluntarily and knowingly waived its Eleventh Amendment immunity, as a matter of federal law, from suits for damages in federal court by accepting federal Rehabilitation Act funds made subject to 42 U.S.C. § 2000d-7. We adhere to the arguments in the dissent from that decision. We concur, however, in the court's disposition of the states' fallback arguments in these cases.[1]

[1] Of course, the court's conclusion here that *state law* properly authorized the state officials to execute contracts in no way undercuts the arguments in dissent from *Pace* that the *federal law* during the relevant time period (1996 through 1998) did not communicate to the states that they possessed Eleventh Amendment sovereign immunity to waive. *See Pace*, 403 F.3d at 301 (Jones, J., dissenting).

330 F.3d 362

United States Court of Appeals,
Fifth Circuit.
Theodore JOHNSON, Plaintiff-Appellee,
v.
LOUISIANA DEPARTMENT OF
EDUCATION; et al., Defendants,
Louisiana Department of Education; State of Louisiana;
President of Louisiana State University System;
Board of Regents, Defendants-Appellants.
Lynn August, Plaintiff-Appellee,
v.
Suzanne Mitchell; Mae Nelson; Ed Barras;
Department of Social Services, for the State
of Louisiana, Defendants-Appellants.
**Nos. 02-30318, 02-30369.**

May 5, 2003.

Theodore Johnson, Bogalusa, LA, pro se.

Kevin K. Russell (argued), Jessica Dunsay Silver, U.S. Dept. of Justice, Civil Rights Div., Washington, DC, for United States of America, Intervenor.

Richard A. Curry, Michael Brent Hicks (argued), McGlinchey Stafford, Baton Rouge, LA, Rebecca L. Clausen, New Orleans, LA, for Defendants-Appellants.

Sanford A. Kutner, Metairie, LA, for Lynn August.

Micheal Leslie Penn, New Orleans, LA, for Suzanne Mitchell, Mae Nelson, Ed Barras and Dept. of Social Services for the State of Louisiana.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JONES, WIENER, and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

## BACKGROUND

This court consolidated the cases of Theodore Johnson and Lynn August due to the common issue whether Eleventh Amendment sovereign immunity bars claims for money damages against entities of the state of Louisiana, which arose during a particular time period, brought under § 504 of the Rehabilitation Act. The district courts refused to dismiss the claims. Based on the recent decision of this court in *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir.2003), we vacate and remand with instructions to dismiss the claims for lack of jurisdiction.

Appellee Johnson was a full time student at the University of New Orleans (UNO) on financial aid. He is disabled by a partial paralysis of his left foot. In February 2000, a medical emergency caused Johnson to withdraw from UNO. Four months later, UNO revoked Johnson's eligibility for financial aid. Johnson successfully appealed the decision. The appeals committee, however, did not inform Johnson of its decision until after the fall 2000 semester had begun; the committee also imposed academic requirements to maintain his eligibility for financial aid. Johnson asserts that because of his late start in fall semester classes, he was unable to comply with the academic requirements. In January 2001, UNO denied Johnson financial aid for the spring semester. Johnson filed suit against the Louisiana Department of Education, the State of Louisiana, the President of the Louisiana State University System, the Louisiana Board of Regents,

and UNO[1] under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act (ADA), and § 504 of the Rehabilitation Act, alleging discrimination against disabled students and failure to provide reasonable accommodations.

August, a blind man, worked as a computer instructor for the Louisiana Department of Social Services (DSS). In June 2000, DSS eliminated August's teaching duties, averring that August failed to submit "manual materials" required for use in the computer course. August contended, to the contrary, that he submitted the necessary materials at the same time as a sighted instructor whose materials were approved. August brought various claims for money damages against the DSS and three state employees in their official capacities, including claims under the ADA and the Rehabilitation Act.

Separate district courts in the Eastern District of Louisiana dismissed all claims against the defendants based on state sovereign immunity except for those under § 504 of the Rehabilitation Act. The defendants appeal, arguing that state sovereign immunity bars the appellees' § 504 claims. Under the collateral order doctrine, appellate jurisdiction exists over an appeal from the denial of a motion to dismiss based on state sovereign immunity. *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir.2001).

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[1] The district court dismissed UNO as a defendant, concluding that the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is the proper party to sue on behalf of UNO. Johnson amended his complaint to name the Board of Supervisors as a defendant.

## DISCUSSION

In denying the appellants' motions to dismiss Johnson's and August's § 504 claims, the district courts concluded that the appellants waived their state sovereign immunity under the Rehabilitation Act by receiving federal funds.[2] This court reviews denials of motions to dismiss based on state sovereign immunity de novo. *Id.* This court's recent decision in *Pace*, 325 F.3d 609, mandates a different conclusion.

Under the Constitution's Article I spending power, Congress may require a state to waive its sovereign immunity as a condition for receiving federal funds if two conditions are met. *Id.* at 614-16. First, "Congress must 'manifest[] a clear intent to condition participation in the programs fun 'ed under the [relevant] Act on a State's consent to waive its constitutional immunity.'" *Id.* at 615 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247, 105 S.Ct. 3142, 3149-50, 87 L.Ed.2d 171, 183 (1985)). Second, the state must knowingly and voluntarily waive its immunity by accepting the funds. *Id.* at 615-17.

*Pace* held that 42 U.S.C. § 2000d-7[3] clearly, unambiguously, and unequivocally conditions the receipt of federal funds on a state's waiver of sovereign immunity under § 504 of the Rehabilitation Act. *Id.* at 614-15. Like the defendants in Pace, however, the appellants in this

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[2] Both courts acknowledged that no scope was left for congressional abrogation of state sovereign immunity by means of § 504 after this court's decision in *Reickenbacker, supra*.

[3] 42 U.S.C. § 2000d-7 provides in pertinent part that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."

case did not knowingly waive their sovereign immunity under § 504 by accepting federal funds. Johnson and August both complain of violations of § 504 that occurred before the Supreme Court's decision in *Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (holding that Title I of the ADA does not validly abrogate state sovereign immunity pursuant to § 5 of the Fourteenth Amendment) and this court's decision in *Reickenbacker,* 274 F.3d at 976 (concluding that Title II of the ADA and § 504 of the Rehabilitation Act do not validly abrogate state sovereign immunity pursuant to Fourteenth Amendment § 5 powers).[4] As we explained in *Pace,* prior to *Garrett* and *Reickenbacker* the appellants had "little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA," *id.* at 616, especially given this court's decision in *Coolbaugh v. Louisiana,* 136 F.3d 430 (5th Cir.1998) (holding that the ADA validly abrogated state sovereign immunity as an exercise of Fourteenth Amendment § 5 powers), *overruled by Reickenbacker,* 274 F.3d 974 (5th Cir.2001). "Believing that the acts validly abrogated their sovereign immunity, the [appellants] did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." *Pace,* 325 F.3d 609 at 616.[5] Because the appellants could not have knowingly waived their sovereign immunity during the period covered by

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[4] Johnson alleges wrongful acts by the appellants in 2000 and in January 2001, and August alleges wrongful acts in 1999 and 2000.

[5] The abrogation analysis with regard to Title II of the ADA and § 504 of the Rehabilitation Act is the same because both acts offer virtually identical protections. *Pace,* 325 F.3d 609, at 617 n. 11; *Reickenbacker,* 274 F.3d at 977 n. 17.

their lawsuits, Johnson's and August's individual claims for money damages under § 504 are barred.[6] We re-emphasize the court's comment in *Pace* that the State's victory will be temporally confined, since after *Garrett*, the state could knowingly waive its immunity by voluntarily continuing to receive federal funds conditioned on waiver. *See id.* at 618 n. 15.

## CONCLUSION

State sovereign immunity bars Johnson's and August's § 504 claims for money damages against the appellants. We therefore vacate the district courts' denials of the appellants' motions to dismiss and remand with instructions to dismiss these claims for lack of jurisdiction.

VACATED and REMANDED.

WIENER, Circuit Judge, either dissenting or specially concurring.*

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[6] We therefore need not reach the appellants' alternative argument that they lacked authority under state law to waive their sovereign immunity against suit in federal court.

* Because of an artificially created, and, in my judgment, unfortunate sequence of events, it is impossible at this juncture to determine whether this writing will be a special concurrence or a dissent: (1) In November 2002, a panel of this court comprising Judges Jones, Smith, and – by designation – Siler of the Sixth Circuit, heard oral argument in *Pace v. Bogalusa City School Board*, and Judge Jones, as presiding judge of the panel, allotted the writing assignment to herself; (2) on February 11, 2003, while *Pace* remained under submission, a panel of this court comprising Judge Jones, myself, and DeMoss heard argument on the instant case, and Judge Jones, as presiding judge of the panel, allotted the writing assignment to herself; (3) six weeks later, on March 24, 2003, while the instant case remained under submission, Judge Jones filed her opinion in *Pace*, 325 F.3d 609 (5th Cir.2003); and

(Continued on following page)

The premise of the instant case is simple: Exercising its Spending Clause powers, Congress offers education funds to the several states under Title X, on the *condition*, pellucidly expressed in 42 U.S.C. § 2000d-7(a)(1), that states accepting such funds will *not* be immune under the Eleventh Amendment from suit in federal court for violation of § 504 of the Rehabilitation Act and other named federal statutes, including Title IX, the Individuals with Disabilities in Education Act ("IDEA"), and the Americans with Disabilities Act ("ADA"). The Louisiana defendants accepted the funds on that express condition, then proceeded to assert sovereign immunity under the Eleventh Amendment after being sued in federal court on claims grounded in the Rehabilitation Act. The panel majority has accepted the Louisiana defendants's premise, reversed the district court, and granted immunity.

The decision in this case, though, is not ours to make, at least not yet. Only if the very recent (and as yet not precedential) decision by a prior panel of this court is *not* reheard en banc, or is reheard but is decided the same way, will this panel be bound. I refer to *Pace v. Bogalusa City School Board*,[1] which involved precisely the same assertions of Eleventh Amendment immunity by Louisiana defendants in a lawsuit brought under the IDEA, ADA and

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(4) on April 9, 2003, Judge Jones circulated to the panel her foregoing opinion in the instant case, rejecting my suggestion that prudence and orderliness require holding this case in abeyance until the time for filing petitions for rehearing in *Pace* expires (it still has not) and the mandate issues, either as a result of (a) our failure to rehear *Pace* en banc, (b) our having reheard and disposed of *Pace* en banc. Thus, until the mandate issues in *Pace*, finally determining the issue that controls in that case and in this one, it will be impossible to classify my writing either as a special concurrence or as a dissent. Only time will tell.

[1] *Id.*

Rehabilitation Act. In an unanimous opinion, the *Pace* panel extended sovereign immunity to the Louisiana defendants, reasoning that they could not have "knowingly waived" their sovereign immunity prior to this court's decision in *Reickenbacker v. Foster*[2] in 2001.[3]

If *Pace* does become precedent, this panel will have no wiggle room: We will be bound by *stare decisis*. With respect, however, I am convinced that the *Pace* panel misapplied the "knowing waiver" test – actually, applied the *wrong* "waiver" test – and thus, putting it candidly, wrongly decided *Pace*. I hope that our court will correct this wrong by rehearing *Pace* en banc. While tentatively concurring with the panel majority's *decision* in this case – per our obligation to follow decisions of prior panels – I must respectfully express my disagreement with the *analysis* employed in *Pace* and, through it, in the instant case, and thus my disagreement with the results reached in both.

The fundamental problem with the reasoning of the panel majority here – repeating the problematic reasoning first employed in *Pace* – is that it conflates the "knowing waiver" exception of Fourteenth Amendment abrogation of sovereign immunity with the "clearly and unambiguously stated/non-coercive" waiver exception for Spending Clause cases. Although both exceptions are confusingly referred to in the case law as "waiver" doctrines, they embody entirely different tests, the latter being less a true waiver and more an acceptance of a *condition precedent* to entitlement to the federal funds.

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[2] 274 F.3d 974 (5th Cir.2001).

[3] *Pace*, 325 F.3d 609 at 611-17.

The relevant statute in both *Pace* and here – § 504 of the Rehabilitation Act – was enacted in 1973. Originally, it purported to waive state sovereign immunity pursuant to Congress's power to abrogate such immunity under § 5 of the Fourteenth Amendment.[4] In 1985, though, the Supreme Court held that the Rehabilitation Act neither abrogated state sovereign immunity under the Fourteenth Amendment nor waived state sovereign immunity under the Spending Clause because it did not express "unequivocal congressional intent" that, under this statute, states would be susceptible to suit in federal court.[5] The following year, Congress responded by amending and re-enacting the Rehabilitation Act with 42 U.S.C. § 2000d-7 to include an express *condition precedent* to a state's waiver of sovereign immunity for any state that accepts federal funds made available under Congress's Spending Clause power. In other words, Congress explicitly chose to re-enact the Rehabilitation Act's waiver of state sovereign immunity under its Spending Clause power.[6]

Thus, in analyzing whether the Louisiana defendants relinquished their sovereign immunity under § 504 of the Rehabilitation Act and § 2000d-7(a)(1) when they accepted

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[4] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n. 4, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

[5] *Id.* at 247, 105 S.Ct. 3142.

[6] Even before the Supreme Court's decision in *Atascadero*, the Spending Clause was replacing the Fourteenth Amendment as the constitutional hook on which to hang Congress's waiver of state sovereign immunity in the Rehabilitation Act. *See Atascadero*, 473 U.S. at 244 n. 4, 105 S.Ct. 3142 (noting that Petitioners were defending the Rehabilitation Act's waiver of state sovereign immunity under Congress's Spending Clause power, although Petitioners conceded that the statute was originally enacted under Congress's Fourteenth Amendment powers).

federal education money, the panel in *Pace* should have applied the *condition precedent* waiver exception of the Constitution's Spending Clause to state sovereign immunity. Instead, the *Pace* court applied the "knowing waiver" exception – wrongly, I respectfully submit – which is specifically prescribed by the Supreme Court *only* for federal "abrogation" statutes enacted by Congress pursuant to § 5 of the Fourteenth Amendment. This distinction is critically important, because employing the "waiver" test that is proper for the Spending Clause leads inescapably to the conclusion that the Louisiana defendants validly relinquished their right to claim sovereign immunity by accepting federal funds. This result flows from the crystal clear, express *condition precedent* in § 2000d-7(a)(1) that by accepting the money, a State agrees to be subject to, *inter alia*, § 504 of the Rehabilitation Act and to suit in federal court on claims arising under that statute – even if the Louisiana defendants might have believed mistakenly that they had no immunity to waive.

Justice Scalia's majority opinion for *College Savings Bank*[7] explains that the "knowing waiver" analysis applies *only* to federal statutes enacted pursuant to § 5 of the Fourteenth Amendment; that, in contrast, when a federal Spending Clause statute forthrightly *conditions* a state's acceptance of a congressional "gift" of funds on the state's relinquishment of sovereign immunity as an automatic consequence of such acceptance,[8] a "fundamentally different"

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[7] 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).

[8] *Id.* at 686-87, 119 S.Ct. 2219 (noting that "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts").

issue is presented.[9] In Spending Clause cases, the only limitation on Congress's power to impose an express *condition precedent* of relinquishing sovereign immunity is that the statute thus conditioning acceptance of funds not be "coercive." As long as the condition is not coercive, the relinquishment of sovereign immunity is valid.[10] The Court emphasized in *College Savings Bank* that this is a significantly lower constitutional hurdle for a federal statute than the one that must be cleared to establish "knowing waiver" of sovereign immunity under § 5 of the Fourteenth Amendment.[11]

As the *College Savings Bank* Court explained, statutes that impute waiver of sovereign immunity as an *ipso facto* consequence of a state's acceptance of federal monies would be "coercive" only at the point "at which 'pressure turns into compulsion,' "[12] such as by requiring the state to refrain "from otherwise lawful activity."[13] A state's acceptance of Spending Clause money is inextricably intertwined with any conditions clearly expressed and attached

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[9] *Id.* at 686, 119 S.Ct. 2219.

[10] *Cf. Grove City Coll. v. Bell*, 465 U.S. 555, 575, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) (noting in Title IX case that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept").

[11] The Court explained that the government's conditioning of federal highway funds on a state's setting its minimum drinking age at 21 years of age was *not* a "coercive" conditional grant of federal funds. *Id.* at 686, 119 S.Ct. 2219. *See South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

[12] *Id.* at 687, 119 S.Ct. 2219 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937))).

[13] *Id.*

by Congress, one of which can be and frequently is the relinquishment of sovereign immunity.[14] This is consistent with our longstanding recognition of Congress's far-reaching power under its Spending Clause prerogative to place conditions on financial "gifts" to the states, which they are free to accept or reject by accepting or rejecting the grant.[15]

The upshot of this analysis is that when a Spending Clause statute clearly imposes, as an automatic *condition precedent* to obtaining federal funds under such a statute, the recipient state's commitment not to invoke sovereign immunity, and a state accepts the funds on that condition, it is wholly inappropriate for a court to embark on the "knowing waiver" analysis announced by the Court in *College Savings Bank* for determining whether Congress has validly abrogated a state's sovereign immunity under § 5 of the Fourteenth Amendment. To do so is to turn a blind eye on the universally recognized distinction between those statutes that would *abrogate* a state's sovereign immunity under the Fourteenth Amendment and those that elicit a state's *agreement* not to assert sovereign immunity as a *condition precedent* of its acceptance of federal funding offered by Congress under its Spending Clause powers.[16] Yet, the panel opinion in *Pace* does

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[14] For example, Congress's Spending Clause power to condition a state's receipt of federal funds in the Medicaid program on a state's waiver of its sovereign immunity to suits thereunder has been recently affirmed by two circuit courts. *See Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir.2002); *Antrican v. Odom*, 290 F.3d 178 (4th Cir.2002).

[15] *See United States v. Lipscomb*, 299 F.3d 303, 318-24 (5th Cir.2002) (discussing Congress's power under the Spending Clause).

[16] Justice Scalia's opinion for the Court in *College Savings Bank* goes so far as to criticize Justice Breyer's dissent for asserting that the

(Continued on following page)

exactly this: It applies the "knowing waiver" test from *College Savings Bank* immediately after it discusses Congress's valid waiver, under the Spending Clause, of state sovereign immunity in the Rehabilitation Act.[17] This unwarranted judicial cross-over produces an erroneous and impermissible confusing or conflating of two parallel but "fundamentally different" lines of jurisprudence.[18]

As the 1986 version of the statute at issue in both *Pace* and this case – the Rehabilitation Act – was indisputably re-enacted pursuant to Congress's Spending Clause power, the only permissible inquiry in these post-1986 cases is (1) whether the *condition precedent* is clearly and unambiguously expressed in the statute, and (2) if it is thus clearly expressed, does this condition "coerce" a waiver from the states in exchange for their obtaining federal funds. As for the clear expression prong of the test, the relevant statutory provision concerning § 504 of the Rehabilitation Act and sovereign immunity states:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation

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distinction between these two separate waiver doctrines "disappears" in some contexts, despite Justice Breyer's acknowledging that there is an "intuitive difference" between the two tests. *College Savings Bank*, 527 U.S. at 687, 119 S.Ct. 2219.

[17] *Pace*, 325 F.3d 609, at 612-16.

[18] *See Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820 n. 5 (9th Cir.2001) (noting that *College Savings Bank* is inapposite to those cases analyzing a waiver of sovereign immunity conditioned on a grant of funds under Congress's Spending Clause power). *See also College Savings Bank*, 527 U.S. at 686, 119 S.Ct. 2219 (noting that Spending Clause "cases seem to us *fundamentally different* from the present one" that involves solely a question of a "knowing" waiver under the Fourteenth Amendment) (emphasis added).

> of section 504 of the Rehabilitation Act of 1973 . . . or of the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[19]

It cannot be questioned – at least not seriously – that this statute explicitly predicates a state's gaining access to federal monies on that state's commitment not to assert sovereign immunity if suits are brought under § 504 of the Rehabilitation Act. This condition applies to any state that accepts these funds, regardless of whether the state "believes" that it does or does not have any immunity to the Rehabilitation Act to relinquish. More important, when the Louisiana defendants took the money, the Supreme Court had *already* blessed the Rehabilitation Act as the paragon of drafting by Congress of a proper waiver under its Spending Clause power. In *Lane v. Pena*, the Court ruled that the current, 1986 version of the Rehabilitation Act

> was enacted in response to our decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), where we held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act, and that the States accordingly were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504." *Id.* at 235, 105 S.Ct. at 3143-3144. By enacting [42 U.S.C. § 2000d-7], *Congress sought to provide the*

[19] 42 U.S.C. § 2000d-7(a)(1).

> *sort of unequivocal waiver that our precedents demand.*[20]

In fact, the Supreme Court went so far as to praise "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in the amended and re-enacted Rehabilitation Act.[21] No room is left for doubt, particularly after the *Lane* Court's ruling in 1996, that the express terms of the Rehabilitation Act clearly and unambiguously create a valid, *ipso facto* waiver of state sovereign immunity under Congress's Spending Clause power as a *condition precedent* to accepting the offered funds – a condition that ripens into irrevocability on acceptance of the funds.

As for the coercion prong of the test for conditions imposed in Spending Clause statutes, there is not even a whiff of duress in the conditional grant language in the Rehabilitation Act. Indeed, it is far less controlling of a state's behavior than the minimum-age drinking laws that were imposed on the states through Congress's exercise of its Spending Clause power, and which were specifically approved by the Supreme Court in *South Dakota v. Dole*.[22] As the Fourth Circuit recently held in adjudicating a Title IX case under the same waiver statute that applies to the Rehabilitation Act:

> [A]ny state reading § 2000d-7(a) . . . would clearly understand the following consequences of

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[20] *Lane v. Pena*, 518 U.S. 187, 200, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) (emphasis added).

[21] *Id.*

[22] 483 U.S. at 206, 107 S.Ct. 2793.

> accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court.[23]

There was simply no legal or factual justification for applying the Fourteenth Amendment's "knowing waiver" test in *Pace* and none exists in this case; indeed, to do so is error as a matter of law. Rather, the *only* proper inquiry in either case is straightforward: Is the Rehabilitation Act's clearly stated condition that a state not assert sovereign immunity coercive? It obviously is not. As previously noted by six of our fellow circuits, the statute is clear; it contains an express condition under Congress's Spending Clause power for waiver of state sovereign immunity, *and* there is nothing coercive about it.[24]

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[23] *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir.1999).

[24] *See Koslow v. Pennsylvania*, 302 F.3d 161, 171 (3d Cir.2002) (holding that the Rehabilitation Act contains an "ordinary *quid pro quo* that the Supreme Court has repeatedly approved"); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir.2001) (holding that "a plaintiff may sue a State under Section 504 of the Rehabilitation Act" because § 2000d-7 is "a valid and unambiguous waiver"); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir.2000) (en banc) (holding that the statute's clear language provided for a valid waiver of state sovereign immunity); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir.2000) (noting that "the Rehabilitation Act is enforceable in federal court against recipients of federal largess"); *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir.1999) (holding that the terms of the Rehabilitation Act provide for a "clear" waiver of state sovereign immunity under the Spending Clause), *rev'd on other grounds*, *Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 652, 148 L.Ed.2d 556 (11th Cir.2000); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.1997) (holding that "the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity").

Even more to the point, it matters not one iota that the Louisiana defendants now say, self-servingly, that they *believed* they had no immunity to waive, and thus cannot be held to the statute's *condition precedent* of waiver. That is wholly illogical and irrelevant: The only material point is that when these defendants took the money, they had no expectation of immunity, regardless of whether this absence of expectation resulted from their own mistake of law (never an excuse) or from a correct reading of the applicable federal legislation. In buying into the Louisiana defendants's groundless mistake of law defense, the panel opinion in *Pace* relies on a Second Circuit opinion that also impermissibly crosses jurisprudential lines in applying the Fourteenth Amendment's "knowing waiver" test to the Rehabilitation Act's *condition precedent* waiver, which was enacted under Congress's Spending Clause power. Thus, *Pace* would put this court on the side of the Second Circuit in the circuit split that it created with the *six* other circuits that have analyzed the Rehabilitation Act properly as providing a waiver of state sovereign immunity under Congress's Spending Clause power *simpliciter*.[20]

Either way, though, the Louisiana defendants made a conscious – "knowing" – choice (1) to accept the federal funds *and*, (2) vis-à-vis *those funds*, to be subject to the Rehabilitation Act and to a lawsuit in federal court on Rehabilitation Act claims. The Louisiana defendants's acceptance of the funds pursuant to the clear wording of

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[20] *Compare supra* note 24 (listing six circuit opinions analyzing the Rehabilitation Act and § 2000d-7 under the proper Spending Clause test) *and* note 18 (identifying another Ninth Circuit case that explicitly makes the same point as here) *with Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir.2001).

the statute triggered the Rehabilitation Act's waiver of state sovereign immunity. Thus, they cannot now assert – nor at any time after the 1986 enactment of § 2000d-7 could they ever have asserted – sovereign immunity against Rehabilitation Act claims.

For these reasons, I specially concur in the decision of the panel majority *if*, in the final analysis, *Pace* should become binding precedent; otherwise, I respectfully dissent. Either way, though, I remain in fundamental disagreement with the reasoning and testing methodology of the panel opinion in *Pace* and thus with the panel majority's opinion here based on *Pace*. If, however, a majority of the judges in active service on this court agree to rehear *Pace* en banc, and the en banc court then decides *Pace* as I advocate in this opinion, the instant case will be returned to this panel for correction. Otherwise, it shall be up to the Supreme Court to right the wrong that I perceive in *Pace* and thus in the panel majority's reliance on it here.

2002 WL 83645 (E.D.La.), 22 NDLR P 172

United States District Court, E.D. Louisiana.
Theodore JOHNSON
v.
STATE of Louisiana, Louisiana Department of Education, President of the L.S.U. System, Board of Regents and University of New Orleans
**No. CIV.A. 01-2002.**

Jan. 18, 2002.

## RULING ON MOTIONS

LIVAUDAIS, District J.

Plaintiff Theodore Johnson ("Mr.Johnson"), proceeding *pro se*, filed suit against defendants alleging various violations of his constitutional and civil rights. All defendants have filed motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). (Record Doc. Nos. 7(UNO), 11 (State of Louisiana, Dept. of Education, President of the LSU system), 19 (Board of Regents).) Defendant University of New Orleans ("UNO") also moved to dismiss because UNO is not a proper party defendant, and alternatively moved for a more definite statement. (Record Doc. No. 7.) Mr. Johnson filed a motion for judgment by default against defendants State of Louisiana, Louisiana Department of Education, and President of the L.S.U. System. (Record Doc. No. 10.) All motions were taken under submission at an earlier date.

## FACTS

The facts as stated in Mr. Johnson's original and amended complaints are sketchy. Mr. Johnson was a full time student at UNO. He is disabled due to partial paralysis

of his left foot and is able to walk only short distances. The Veteran's Administration paid for Mr. Johnson's first two years at UNO through its Vocational/Rehabilitation program. He continued his education at UNO upon receipt of financial aid administered by a UNO program which Mr. Johnson alleges receives federal funds.

In February of 2000, Mr. Johnson resigned from UNO during the semester due to a medical emergency. He provided to UNO a statement from his doctor relative to his medical condition. On June 13, 2000, UNO notified Mr. Johnson that he was no longer eligible to receive financial aid. Apparently disregarding his doctor's statement, UNO required him to file a written appeal. His appeal was ultimately successful, but he was not notified until after the Fall 2000 semester was already underway. In addition, the appeals committee imposed specific academic requirements (referred to as "sanctions" by Mr. Johnson) on him for his continued receipt of financial aid:

1. That he successfully complete 75% of the courses he registered for in the Fall 2000 semester;

2. That he attain at least a 2.50 semester G.P.A. for the Fall 2000 semester.

Mr. Johnson claims that as a result of his belated start in his classes, he was only able to attain a 1.97 G.P.A. It is not clear from his complaint and amended complaint exactly what next transpired, but on or about January 16, 2001, Mr. Johnson received a scholastic warning for having a G.P.A. of 1.97, and received a letter from someone[1] at

[1] In his original complaint, Mr. Johnson states that the letter was from Christine M. Flugg, Associate Vice Chancellor for Enrollment Management (Financial Aid), but in his amended complaint he refers to

(Continued on following page)

UNO which stated that he had been denied financial aid for the Spring 2001 semester and informed him that there "was no possibility of an appeal". There is no copy of the letter in the record. He apparently notified UNO that it was in violation of 28 C.F.R. § 35.130(b)(3) and requested special consideration for his disability under 28 C.F.R. § 35.130(c), which was denied.

Mr. Johnson alleges that UNO illegally denied him financial aid and thus discriminated against him by effectively denying him admission to UNO. The crux of Mr. Johnson's complaint is that it was UNO's financial aid office's own actions (i.e. its excessive delay in granting his appeal of the denial of his financial aid for the Fall 2000 semester), that caused him to be unable to comply with the heightened academic requirements imposed upon him as a condition of his continued receipt of financial aid. He further complains that the heightened academic requirements imposed on him violate applicable Federal Department of Education regulations on the eligibility of students for financial aid, and were imposed upon him in retaliation for his prior appeals and complaints that financial aid's actions violate applicable Federal regulations.

Mr. Johnson alleges that the financial aid appeals process is secretive and unfair because the rules are excessively vague and narrowly interpreted, and because those students affected are not allowed to appear in person before the appeals committee. He alleges that financial aid's "Satisfactory Academic Progress Policy for Financial Aid/Scholarships Earned/Pursued Hours" ratio and G.P.A.

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an undated letter from Jenifer Burton, Appeals Committee Chairperson, denying him financial aid for the Spring 2001 semester.

standard has a discriminatory effect because it tends to "screen out" disabled students. Finally[2], Mr. Johnson takes a parting shot aimed at the Louisiana Tuition Opportunity Program for Students (TOPS), LSA-R.S. 17:3048.1, alleging that it violates federal regulations (34 C.F.R. 110 et seq.) because it has age limitations and other discriminatory regulations which presumably exclude him from participating in or receiving any financial aid from that program.

Mr. Johnson alleges that defendants' actions violated his civil rights pursuant to 42 U.S.C. § 1983 by depriving him of his constitutional right to due process and equal protection under the Fourteenth and Fifth Amendments, violated the Ninth Amendment, as well as Title II of the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12101 et seq.), Section 504 of the Rehabilitation Act (29 U.S.C. § 794), the National Education Reform Act (20 U.S.C. § 5801), and 20 U.S.C. §§ 1091, 1099, and 12211-1, 42 U.S.C. § 2000c-8, and the Louisiana Constitution of 1974 Art. 1, §§ 2 and 22. He asks for actual damages, compensatory damages, punitive damages, attorney fees, court costs and interest.

## LAW

Dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) is proper only if the pleadings on their face reveal

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[2] Mr. Johnson also takes the opportunity to complain that UNO's counseling program for students is so substandard as to qualify as no counseling at all. Even assuming that his allegation is true, he has not alleged how this violates any of his civil or constitutional rights or any applicable statutory mandates or regulations, and indeed the Court can comprehend no such violations.

beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief, or if an affirmative defense or other bar to relief appears on the face of the complaint. *Garrett v. Commonwealth Mortg. Corp. of America,* 938 F.2d 591, 594 (5th Cir.1991). Moreover, the Court must assume that the allegations in plaintiff's complaint are true, and must resolve any doubt regarding the sufficiency of plaintiff's claims in his favor. *Fernandez-Montes v.. Allied Pilots Ass'n.,* 987 F.2d 278, 284 (5th Cir.1993). Motions to dismiss for failure to state a claim are disfavored in the law because the Federal Rules of Civil Procedure "require only 'notice' pleading – that is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests". *Mahone v. Addicks Utility District of Harris County,* 836 F.2d 921, 926 (5th Cir.1988) (citing *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957) (quoting Fed.R.Civ.P. 8(a)(2))). At the pleading stage on a motion to dismiss, the Court presumes that general factual allegations embrace those specific facts that are necessary to support the claim. *Lujan v. National Wildlife Federation,* 497 U.S. 890, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). However, "dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir.1991). Moreover, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss". *Id.*

## ANALYSIS

## I.

## PROPER PARTY DEFENDANTS

### UNO

Defendant UNO correctly argues that it is not the proper party defendant in this action. UNO is a member of the Louisiana State University system.[3] La. R.S. 17:3215. Pursuant to LSA-R.S. 17:3351, it is the power, duty and function of the appropriate supervisory college or university boards to "sue and be sued". The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU Board of Supervisors") is the proper party to sue or be sued on behalf of UNO. *See Delahoussaye v. City of New Iberia*, 937 F.2d 144, 148 (5th Cir.1991) (The Board, not the University, has the right to sue and be sued in its own name). UNO must be dismissed as a defendant, and plaintiff may amend his complaint to add the LSU Board of Supervisors as the proper defendant.[4]

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[3] The Louisiana State University system consists of the institutions under the supervision and management of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, which includes LSU (Baton Rouge), UNO, LSU at Alexandria, LSU at Eunice, LSU at Shreveport, and the health sciences center (medical center). LSA-R.S. 17:3215.

[4] For the sake of consistency and simplicity, the Court will continue to refer to UNO as a defendant in this document. Any discussion or rulings herein applying to UNO will also be applicable to the LSU Board of Supervisors.

*President of the LSU System*

It is unclear from Mr. Johnson's complaint and amended complaint whether the President of the LSU System is sued in his individual or official capacity. The President of the LSU System argues that he is not a proper party defendant under the Rehabilitation Act or the ADA if sued in his individual capacity. The Rehabilitation Act (29 U.S.C. § 794(b)) prohibits discrimination against disabled persons "under any program or activity receiving Federal financial assistance." Title II of the ADA (42 U.S.C. § 12132) likewise prohibits discrimination in "services, programs, or activities of a public entity". The enforcement provision of Title II, at 42 U.S.C. § 12133, incorporates the "remedies, procedures and rights set forth in section 794a of Title 29," the enforcement provision of the Rehabilitation Act. In *Lollar v. Baker,* 196 F.3d 603 (5th Cir.1999), the Fifth Circuit noted that the enforcement provision of the statute provides for suit against "any program or activity". *Id.* at 609. That Court held that the *program* is the recipient of the federal financial assistance, therefore the plaintiff cannot sue an individual under the Act. *Id.*[5] The President of the LSU system in his individual

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[5] *But see Brennan v. Stewart,* 834 F.2d 1248, 1262 (5th Cir.1988) (without addressing the issue specifically, the Fifth Circuit remanded plaintiff's Section 504 claim for damages against individual defendants (the individual members of the Board that denied the training permit at issue) for further proceedings to determine whether defendants had denied plaintiff "meaningful access" and "meaningful accommodation" under the statute); *and McGregor v. Louisiana State University Board of Supervisors,* 3 F.3d 850, 862 (5th Cir.1993) (applying the "qualified immunity" standard to plaintiff's Section 504 claims against the Board members in their individual capacities), *cert. denied,* 510 U.S. 1131, 114 S.Ct. 1103, 127 L.Ed.2d 415 (1994).

capacity must be dismissed as a defendant as to claims brought pursuant to the ADA and Rehabilitation Act.

## II.

## SOVEREIGN IMMUNITY

All defendants argue that plaintiff's claims against them pursuant to the ADA, the Rehabilitation Act and his claims for deprivation of civil rights pursuant to Section 1983 are barred by Eleventh Amendment immunity.[6] Mr. Johnson argues that the state waived its sovereign immunity by accepting federal funding for its educational institutions.[7]

The Eleventh Amendment to the United States Constitution bars suits in federal court against a state by its own citizens, regardless of the nature of the relief sought. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001);

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[6] Defendants State of Louisiana, Louisiana Department of Education and President of the LSU System also argue that plaintiff's ADA claims should be dismissed because plaintiff has not exhausted his administrative remedies. The plaintiff sued under Title II of the ADA (prohibiting discrimination in public services, programs or activities), not Title I (prohibiting discrimination in employment). A plaintiff must exhaust administrative remedies prior to suit pursuant to Title I of the ADA, not Title II. Defendants' argument is irrelevant to the case at bar.

[7] Citing *Cozzo v. Tangipahoa Parish Council, et al*, 262 F.3d 501 (5th Cir.2001) Mr. Johnson also argues incorrectly that defendant UNO is a "political subdivision" of the state, therefore is not entitled to sovereign immunity. As discussed herein, UNO is not a proper party defendant. The LSU Board of Supervisors is the proper defendant in place of UNO.

*Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890); *LeSage v. State of Texas,* 158 F.3d 213, 216 (5th Cir.1998), *rev'd in part on other grounds and remanded,* 528 U.S. 18, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999). The Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated it. *LeSage,* 158 F.3d at 216; *Cozzo,* 262 F.3d at 508; *Nihiser v. Ohio Environmental Protection Agency,* 269 F.3d 626, 627 (6th Cir.2001). By statute, Louisiana has refused to waive its Eleventh Amendment immunity. *Cozzo,* 262 F.3d at 508; LSA-R.S. § 13:5106(A). However, a state may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.'" *Pederson v. Louisiana State University,* 213 F.3d 858, 876 (5th Cir.2000) (citing *Litman v. George Mason University,* 186 F.3d 544,550 (4th Cir.1999) (quoting *Atascadero State Hosp.,* 473 U.S. at 247, 105 S.Ct. 3142), *cert. denied,* 528 U.S. 1181, 120 S.Ct. 1220, 145 L.Ed.2d 1120 (2000)). Congress may abrogate a state's Eleventh Amendment immunity only by "unequivocally" expressing its intent to do so and by acting "pursuant to a valid exercise of power". *Cozzo,* 262 F.3d at 508 (citing *Fla. Prepaid Postsecondary Educ. Expenses Bd. V. Coll. Sav. Bank,* 527 U.S. 627, 634 (1999)).

"Eleventh Amendment immunity, if applicable, is shared by a state's agencies and officers to the extent that the state is the 'real, substantial party in interest.'" *Lesage,* 158 F.3d at 216 (citing *Pennhurst State School & Hospital,* 465 U.S. at 101, 104 S.Ct. at 908 (other citations omitted)). The Louisiana Department of Education is an executive department of the State of Louisiana and shares

the State's sovereign immunity. La. R.S. 36:642 (West Supp.2001); *and see Darlak v. Bobear,* 814 F.2d 1055, 1059 (5th Cir.1987) (citing *Voisin's Oyster House, Inc., v. Guidry,* 799 F.2d 183, 186 (5th Cir.1986) and finding that the Department of Health and Human Resources is an arm of the state because it was created as part of the executive branch by state statute). The Board of Regents (which oversees the LSU Board of Supervisors among other State educational systems) and the LSU Board of Supervisors, are considered to be agencies of the State of Louisiana. *Delahoussaye,* 937 F.2d at 147; *and see Boston v. Tanner,* 29 F.Supp.2d 743, 745-47 (W.D.La.1998).[8] If the State of Louisiana is entitled to Eleventh Amendment immunity, so are those defendants.

The President of the LSU System argues that if sued in his official capacity, he is entitled to Eleventh Amendment immunity because a suit against a state official is essentially a suit against the state. *See Pennhurst State Sch. & Hospital,* 465 U.S. at 101, 104 S.Ct. at 908; *Brennan v. Stewart,* 834 F.2d 1248, 1251 (5th Cir.1988). However, a suit against a state official seeking to enjoin that official's unconstitutional acts or violation of a federal statute is not considered to be a suit against the state itself, thus is not barred by the Eleventh Amendment.

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[8] *Darlak, Delahoussaye* and *Boston* each evaluated the respective agencies' immunity using the same factors to determine whether "the state is the real, substantial party in interest" that the *Cozzo* court used: 1) whether the state statutes and case law view the agency as an arm of the state; 2) the source of the entity's funding; 3) the entity's degree of local autonomy; 4) whether the entity is concerned primarily with local as opposed to statewide problems; 5) whether the entity has the authority to sue and be sued in its own name; and 6) whether the entity has the right to hold and use property. *See Cozzo,* 262 F.3d at 508 (citing *Hudson v. City of New Orleans,* 174 F.3d 677 681 (5th Cir.1999)).

*Pennhurst,* 465 U.S. at 103, 104 S.Ct. at 909; *Brennan,* 834 F .2d at 1252 (citing *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Thus, the President of the LSU system, while immune from suits seeking money damages, is not immune from suits seeking prospective injunctive relief from his acts that violate a person's statutory or constitutional rights. *See id.*

A.

*Section 504 of the Rehabilitation Act*

Mr. Johnson alleges that defendants violated Section 504 of the Rehabilitation Act by refusing to provide a reasonable accommodation requested by him in consideration of his disability. He also alleges that UNO's financial aid eligibility standards are applied in such a way as to have a discriminatory impact on most disabled students.

Section 504 prohibits discrimination against "a qualified individual with a disability . . . solely by reason of his or her disability" in any program or activity that receives Federal financial assistance. 29 U.S.C. § 794. "Section 504 has been construed 'as prohibiting disadvantageous treatment, rather than as mandating preferential treatment.'" *Brennan,* 834 F.2d at 1259-60 (citing *Wimberly v. Labor & Industrial Relations Comm'n,* 479 U.S. 511, 107 S.Ct. 821, 825, 93 L.Ed2d 909 (1987)). However, while the Supreme Court has made clear that "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person", the federal grantee may, under some circumstances, have *some* affirmative duties. *Brennan,* 834 at 1260 (quoting *Southeast Community College v. Davis,* 442 U.S. 397, 412-13, 99 S.Ct. 2361,

2370-71, 60 L.Ed.2d 980 (1979)). Aggrieved individuals are entitled to sue for money damages as well as prospective injunctive relief. *See Lane v. Pena,* 518 U.S. 187, 198, 116 S.Ct. 2092, 2099, 135 L.Ed.2d 486 (1996).

In response to the Supreme Court's decision in *Atascadero State Hospital*[9], Congress amended the Rehabilitation Act by enacting the "equalization" provision, codified at 42 U.S.C. § 2000d-7, which "craft[ed] an unambiguous waiver of the States Eleventh Amendment immunity." *Lane,* 116 S.Ct. at 2099-2100. That section provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7. While the Fifth Circuit has not directly addressed the issue,[10] in *Reickenbacker v. M.J. Foster, Jr.,* 2001 WL 1540402, *7, 274 F.3d 974, (5th Cir.(La.) 2001), it noted that in *Lane,* the Supreme Court held that 42 U.S.C. § 2000d-7 created a waiver of Eleventh Amendment immunity with respect to those statutes listed

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[9] *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

[10] In *Reickenbacker,* the Fifth Circuit explicitly declined to consider plaintiffs' argument that Louisiana has waived its immunity under the Rehabilitation Act when it accepted federal monies because plaintiffs had failed to raise the issue in the district court. *Id* . at *6.

in Section 2000d-7. *Id.* at n. 73. Moreover, in *Pederson* the Fifth Circuit considered whether, for purposes of Title IX of the Education Act of 1972, 42 U.S.C.A. § 2000d-7 created a valid waiver of Eleventh Amendment immunity when a state accepts federal funds. *Pederson*, 213 S.Ct. at 876. That Court adopted the reasoning and holding of the Fourth Circuit in *Litman* when it held that Louisiana State University had waived its Eleventh Amendment immunity from suit pursuant to Title IX of the Education Act of 1972 by accepting federal funds for its educational institutions. The *LeSage* court reached the same conclusion with regard to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *LeSage*, 158 F.3d at 219. This Court concludes that the Fifth Circuit's reasoning and holdings in both *Pederson* and *LeSage* is equally applicable to Section 504 of the Rehabilitation Act, also an enumerated statute under 42 U.S.C. § 2000d-7.

Mr. Johnson has alleged that UNO receives federal funds for its financial aid program. Assuming that is true, as required when considering a motion to dismiss, then defendants waived their Eleventh Amendment immunity from claims for money damages and/or injunctive relief pursuant to Section 504 of the Rehabilitation Act by accepting federal funds.

B.

*Title II of the ADA*

Mr. Johnson also claims damages for defendants' alleged violation of Title II of the ADA. In contrast to the Rehabilitation Act, Title II of the ADA creates an "affirmative accommodation obligation on the part of public entities" to avoid discrimination against disabled individuals.

42 U.S.C. § 12132; *Reickenbacker*, 2001 WL 1540402 at *6. In light of the Supreme Court's decision in *Garrett*,[11] in *Reickenbacker* the Fifth Circuit revisited its holding in *Coolbaugh*[12] that Congress had validly abrogated states' sovereign immunity when it enacted the ADA. Following the Supreme Court's lead, and agreeing with other circuits[13] that have considered the issue, the Fifth Circuit held that Congress had not validly abrogated the states' Eleventh Amendment immunity when it enacted the ADA. *Reickenbacker*, 2001 WL 1540402 at *6.[14]

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[11] In *Garrett*, the Supreme Court held that Congress had not validly abrogated of Eleventh Amendment immunity to suits brought pursuant to Title I of the ADA. *Garrett*, 121 S.Ct. at 962.

[12] *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir.1998), *cert. denied*, 525 U.S. 819, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998).

[13] *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626 (6th Cir.2001); *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir.2001); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir.2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 2591, 150 L .Ed.2d 750(2001); *Clark v. California*, 123 F.3d 1267 (9th Cir.1997); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir.2000), *cert denied*, *Wilson v. Armstrong*, 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998).

[14] Mr. Johnson appears to argue that Louisiana's acceptance of federal funds for its educational institutions operates as an "across the board" waiver of its Eleventh Amendment immunity as to all of his claims. This Court found no cases in which any court has addressed the issue of whether a state's acceptance of federal funds constitutes a waiver of its Eleventh Amendment immunity for purposes of suit against a state pursuant to Title II of the ADA. The Court, however, takes note of the Fifth Circuit's adoption of the "strident" test for finding such a waiver, *see Pederson*, 213 F .3d at 876 (citing *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 605 (1999)). The *Pederson* Court held "that in 42 U.S.C. § 2000d-7(a)(a)[sic] Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity". *Id.* at 876. The ADA was enacted after 42 U.S.C. § 2000d-7, and that statute has not been amended by

(Continued on following page)

All defendants except the President of the LSU system are immune from Mr. Johnson's claims pursuant to Title II of the ADA. Under the *Ex parte Young* doctrine, sovereign immunity "is no bar to suits for injunctive relief against state officials" for violation of the ADA. *Id.* at *1; *Garrett,* 121 S.Ct. at 968, n. 9. Mr. Johnson has not asked for prospective injunctive relief. He may amend his petition to do so if he wishes.

C.

*Civil Rights Violations*

Mr. Johnson alleges that under color of state law, in violation of 42 U.S.C. § 1983, defendants violated his Fourteenth and Fifth Amendment due process and equal protection rights, and the Ninth Amendment.[15] "In the context of a 12(b)(6) motion in a Section 1983 suit, the focus should be 'whether the complainant properly sets forth a claim of a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States caused by persons acting under color of state law."' *Fontana v. Barham,* 707 F.2d 221, 225 (5th Cir.1983), *cert. denied,* 464 U .S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984).

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Congress to "clearly, unambiguously and unequivocally" include the ADA within its scope.

[15] Mr. Johnson also alleges a violation of 42 U.S.C.2000c-8. That section, enacted as part of the Civil Rights Act of 1964 "expressly preserves pre-existing private remedies against discrimination 'in public education,' which would include the remedies provided by § 1983." *Cannon v. University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 1972 at n. 12, 60 L.Ed.2d 560 (1979) (White, J., dissenting). It does not create a new private right of action.

Congress did "not explicitly and by clear language indicate on its face" an intent to abrogate the States' Eleventh Amendment immunity in enacting Section 1983, and the State of Louisiana has not waived its sovereign immunity in such cases. LSA-R.S. 13:5106(A); *Cozzo*, 262 F.3d at 508; *Brennan*, 834 F.2d at 1252 (citing *Edelman v. Jordan*, 415 U.S. 651, 675-76, 94 S.Ct. 1347-1361-62, 39 L.Ed.2d 662 (1979)). The State of Louisiana, including its executive department and agencies, is immune from Mr. Johnson's Section 1983 suit for violation of his constitutional or federal statutory rights. Under the *Ex parte Young* doctrine, the President of the LSU System is immune from Mr. Johnson's claims pursuant to § 1983 for money damages, but not from a claim for prospective injunctive relief.

i.

Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Elderidge*, 424 U.S. 319, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). "[T]he fourteenth amendment's due process safeguards extend to the 'interests that a person has already acquired in specific benefits'". *Mahone*, 836 at 929 (citing *Board of Regents v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701,2706, 33 L.Ed.2d 54 (1972)); *and see Mathews*, 96 S.Ct. at 901. "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 96 S.Ct. at 902 (citing *Armstrong*

*v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).

Mr. Johnson alleges that he was deprived of his eligibility for financial aid without a meaningful hearing or an appeal. Although his complaint and amended complaint provide precious little in the way of material facts to support his claim, he has, at a bare minimum, stated a claim for violation of his right to due process.

ii.

Equal Protection

The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *Brennan*, 843 F.2d at 1257 (citing *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)); *Mahone*, 836 F.2d at 932. State action through its administrative and regulatory agencies implicates the Fourteenth Amendment equal protection clause. *Mahone*, 836 F.2d at 932 (citing *Robinson v. State of Florida*, 378 U.S. 153, 156, 84 S.Ct. 1693, 1695, 12 L.Ed.2d 771 (1964)). Equal protection of the law requires not only that laws be equal on their face, but also that they be executed so as not to deny equality. *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.2d 220 (1886)). "Even discretion may not be exercised on a discriminatory basis." *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 130 (5th Cir.1986).

Mr. Johnson alleges (1) that UNO's financial aid regulations, when applied equally, have a discriminatory impact on disabled students, that is, that disabled students should be treated differently than non-disabled students to achieve equal protection, and (2) that he was

singled out for application of heightened academic standards not applied to all financial aid recipients and in violation of applicable federal regulations. Again, Mr. Johnson's allegations are bare bones, lacking in supportive material facts, but enough make out a cause of action for violation of the equal protection clause.

iii.

Ninth Amendment

Mr. Johnson's amended complaint alleges that UNO violated his Ninth Amendment rights by not allowing him "to appear in proper person to defend [himself] against accusations and charges made by the Financial Aid Appeals Committee." Amended Complaint, Section P. The Ninth Amendment states "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The amendment was intended to protect from government infringement "additional fundamental rights" not specifically mentioned in the first eight constitutional amendments. *Griswold v. State of Connecticut,* 381 U.S. 479, 488, 85 S.Ct. 1678, 1684, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring opinion). Its purpose was not to create new substantive constitutional guarantees, but to avoid degrading or lowering unarticulated fundamental rights implicit but not enumerated in the Bill of Rights. *Id.* Mr. Johnson's complaint is in essence an allegation of violation of his right to procedural due process. Because his complaint alleges a violation of a specifically enumerated constitutional right, it does not implicate the Ninth Amendment. That claim must be dismissed.

## III.

## FEDERAL EDUCATION STATUTES AND REGULATIONS

Mr. Johnson complains that defendants have violated various federal statutes and regulations that relate to public education. Specifically, he alleges that UNO violated 20 U.S.C. § 5801 et seq., the National Education Reform Act; 20 U.S.C. § 1091, relating to standards for student eligibility for some forms of financial assistance; 20 U.S.C. § 1099 (which probably should be § 1099a relating to states' and institutional responsibility to the Secretary of the Department of Education); and 20 U.S.C. § 1221-1, National Policy with respect to equal educational opportunity.[16] The Court found no applicable enforcement provisions in any of these statutes granting a private right of action as to any person or entity for any violations of the various statues [sic]. To the extent that Mr. Johnson's complaint and amended complaint purport to claim damages for violations of any of these statutes, such claims must be dismissed.

## IV.

## TOPS

Mr. Johnson complains that the Louisiana TOPS program, LSA-R.S. 17:3048.1, which provides free tuition and books to eligible Louisiana high school graduates who attend colleges and universities in Louisiana, violates 34

[16] Mr. Johnson also alleges at section XIX of his complaint that "Defendants use criteria that violates 20 U.S.C. 1143". The Court notes that the statute was repealed by Pub.L. 105-244, Title I, § 101)b), Title VII, § 702, Oct. 7, 1998, 112 Stat. 1616, 1803.

C.F.R. 110 et seq. because its age restrictions are discriminatory. The federal regulation cited by Mr. Johnson is authorized by 42 U.S.C. § 6101 et seq., which prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. The statute and the regulations cited by Mr. Johnson require the exhaustion of administrative remedies under the Act prior to filing a civil suit. 42 U.S.C. 6104(f); 34 C.F.R. § 110:31. Mr. Johnson has not alleged that the TOPS program receives federal funds, nor has he indicated that he has exhausted his administrative remedies. His complaint relating to the TOPS program must be dismissed without prejudice.

## V.

## LOUISIANA CONSTITUTIONAL DUE PROCESS

Mr. Johnson alleges that defendants violated Art. 1, § 2 of the Louisiana State Constitution of 1974.[17] Section 2 guarantees due process of law to Louisiana citizens. Under Louisiana law, damages have been regarded as the appropriate remedy for violation of a person's constitutionally protected property interests. *Moresi v. Dept. of Wildlife & Fisheries,* 657 So.2d 1081, 1093 (La.1990).

The Louisiana Constitution due process clause does not offer greater protection against government misconduct than does federal constitutional due process. *State v. Smith,* 614 So.2d 778, 780, (La.App. 2 Cir.1993). It "embodies the fundamental fairness guarantees inherent in its federal counterpart." *In re C.B.,* 708 So.2d 391, 397 (La.1998). It is

[17] Mr. Johnson also alleges a violation of § 22. Section 22 guarantees citizens access to the courts, which is not an issue in this matter, and will not be addressed.

not necessary for this Court to conduct a separate analysis of Mr. Johnson's state due process claim. If Mr. Johnson ultimately prevails on his federal due process claim, he coincidentally prevails on his state due process claim.

## VI.

## UNO'S MOTION FOR A MORE DEFINITE STATEMENT

UNO argues that Mr. Johnson's complaint is so vague that it is unable to mount a defense. The Court agrees. Mr. Johnson's complaint and amended complaint make out a bare bones claim for violation of the Rehabilitation Act, Title II of the ADA, and his due process and equal protection rights.[18] He has not, however, specified exactly how defendant's actions violated the statutes or his constitutional rights. A defendant is entitled to a more detailed recitation of the particular material facts on which the plaintiff contends he will establish his right to recovery from defendant. *Brennan,* 834 F.2d at 1251 (citing *Elliot v. Perez,* 751 F.2d 1472, 1482 (5th Cir.1985)). In this matter, for example, material facts may include (but not necessarily be limited to) why Mr. Johnson was denied a right to appeal the denial of financial aid for the Spring 2001 semester, what accommodation did he request of whom and why was it denied, how the standards for maintaining eligibility for financial aid applied to him are different

[18] The only claim for money damages that is viable as to all defendants is the claim of violation of the Rehabilitation Act. The ADA, due process and equal protection claims remain potentially viable as to the President of the LSU System, and then only as to prospective injunctive relief should Mr. Johnson wish to amend his complaint to request such relief.

than those applied to other financial aid recipients, or exactly how does application of those standards have a discriminatory impact on disabled students. Mr. Johnson must amend his complaint to state material facts in support of his allegations.

## VII.

## MR. JOHNSON'S MOTION FOR JUDGMENT BY DEFAULT

Mr. Johnson moved for a judgment by default against the State of Louisiana, the Department of Education and the President of the LSU System for failure to timely answer his complaint. According to the record, those parties were served by certified mail on July 12 and 13, 2001. They first filed a pleading, these motions to dismiss, on September 21, 2001. There is nothing in the record indicating that those defendants requested an extension of time in which to answer or otherwise plead. While defendants have offered no reason for it, the delay occurred very early in the litigation and had no significant impact on the timing of judicial proceedings, and there is no danger of prejudice to plaintiff in this matter because of the delay. Taking all circumstances into account, *see Pioneer Inv. Services v. Brunswick Associates,* 507 U.S. 380, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993), Mr. Johnson's motion for a judgment of default is denied.

Accordingly, upon considering the complaint and amended complaint, all parties briefs and reply briefs, and the law,

IT IS ORDERED that plaintiff Theodore Johnson's motion for a judgment of default against defendants State

of Louisiana, Department of Education and President of the LSU System BE AND IS HEREBY DENIED; and

IT IS FURTHER ORDERED that all defendants' motions to dismiss plaintiff's complaint against them for violation of Section 504 of the Rehabilitation Act BE AND ARE HEREBY DENIED; and

IT IS FURTHER ORDERED that all Defendants' motions to dismiss plaintiff's claims for money damages against them for violations of Title II of the ADA, federal due process and federal equal protection rights, the Ninth Amendment, and the various federal education statutes and regulations BE AND ARE HEREBY GRANTED; and

IT IS FURTHER ORDERED that plaintiff's complaint against all defendants for age discrimination in violation of 42 U.S.C. 6101 et seq., BE AND ARE HEREBY DISMISSED WITHOUT PREJUDICE; and,

IT IS FURTHER ORDERED that Defendant UNO's motion for a more definite statement BE AND IS HEREBY GRANTED; and

IT IS FURTHER ORDERED that Defendant UNO's motion to dismiss it as a defendant BE AND IS HEREBY GRANTED, and

IT IS FURTHER ORDERED that Plaintiff Theodore Johnson is hereby ORDERED to amend his complaint within sixty (60) days as provided herein.

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2001 WL 1160857 (E.D.La.)

United States District Court, E.D. Louisiana.
Lynn AUGUST
v.
Suzanne MITCHELL, et al
**No. 00-3756.**

Sept. 28, 2001.

*ORDER AND REASONS*

BARBIER, J.

Before the Court is the Motion for Judgment on the Pleadings to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction (Rec.Doc. 10), filed by defendants, Suzanne Mitchell, Mae Nelson, Ed Baras, and the Department of Social Services for the State of Louisiana ("DSS"). Plaintiff opposes the motion. The motion, set for hearing on Wednesday, September 26, 2001, is before the Court on briefs without oral argument.

*BACKGROUND*

Plaintiff, a blind African-American male, filed the complaint herein alleging that the defendants violated rights guaranteed him under 42 U.S.C. §§ 1981 & 1983 (Civil Rights Act claims); 29 U.S.C. § 791 *et seq.* (Rehabilitation Act claims); and 42 U.S.C. § 12101 *et seq.* (Americans with Disabilities Act ("ADA") claims). While it is not entirely clear from the Complaint or other record evidence, it appears that plaintiff may have been employed as a computer instructor at the DSS, and that employment

may have been terminated in June 2000.[1] Apparently, the elimination of his teaching duties was made due to DSS's determination that plaintiff had failed to submit certain "manual materials" required for use in the course. Plaintiff avers that he did in fact submit the necessary "manual materials" timely, at the same time as a sighted white male instructor, whose materials were approved. While neither the Complaint nor the opposition says so, presumably the white male's employment (if that is in fact what we are dealing with here) was not terminated.

In a separate allegation, plaintiff complains that defendant Mitchell "arbitrarily and capriciously directed her staff to purchase computer supplies and equipment from Caucasian vendors, knowing that at least one of the Caucasian vendors needed to utilize the plaintiff directly as a source of supply." Complaint, ¶ 26. The Complaint is devoid of clues as to whether these purchases are somehow related to plaintiff's former instructor status, or if they relate to some other business he has conducted as a supply vendor to the DSS (whether in the past or present is unclear – no time frame is mentioned in connection with the allegations). Equally obscure is why plaintiff would

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[1] The Complaint is entirely devoid of details regarding plaintiff's relationship to the defendants. It is not clear if plaintiff was a regular full-time employee of the DSS working as an instructor; or if he was an independent contractor whose contract was not renewed; or if he was "demoted" from an instructor's position to some other position within the agency and still works there in some capacity today; or if he was not even an employee but rather a participant in some type of unpaid vocational rehabilitation program and had his further participation denied. Portions of the defendants' memorandum in support of their motion lead the Court to infer that the relationship was an employment relationship; the Court assumes this to be the case for purposes of this motion.

complain that Mitchell was sending him business (which appears to be the allegation). At any rate, plaintiff also claims that he "was subjected to a field audit from the State of Louisiana [and] Caucasian vendors were not subjected to an audit." *Id.* at ¶ 27.

While plaintiff states at the outset of the Complaint that he seeks damages and injunctive relief (*Id.* at ¶ 1), in point of fact, his prayer seeks damages only (*Id.* at ¶ 32). All of the allegations against the individual defendants appear to be made against them in their official capacities. Accordingly, the Court is presented with the issue of whether subject matter jurisdiction exists over the plaintiff's civil rights, Rehabilitation Act, and ADA claims for money damages against the DSS and DSS employee defendants in their official capacities.

Defendants argue, *inter alia,* that they are entitled to Eleventh Amendment immunity from suit for plaintiff's civil rights and ADA claims. Plaintiff opposes dismissal of the claims arguing that jurisdiction is present based upon the doctrine expressed in *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1908).

## *DISCUSSION*

In ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court must construe plaintiff's complaint broadly and liberally, although argumentative inferences favorable to the pleader will not be drawn. *Norton v. Larney,* 266 U.S. 511, 45 S.Ct. 145, 147 (1925); *see also* Fed. Rule Civ. Proc. 8(f). The Court also accepts as true all uncontroverted factual allegations of the pleadings. *Gibbs v. Buck,* 307 U.S. 66, 59 S.Ct. 725, 729 (1939). The Court has considered the instant motion and the facts

of this case as alleged in plaintiff's complaint in conformity with these standards.

*Civil Rights claims against the DSS*

The Eleventh Amendment bars actions brought against a state in federal court by its own citizens or citizens of another state, absent consent, waiver, or abrogation of the state's sovereign immunity. U.S. CONST. amend. XI; *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355 (1974). A suit against the DSS, a state agency that is part of the executive branch of the state, is one against the State of Louisiana. *See, Darlak v. Bobear*, 814 F.2d 1055, 1059-60 (5th Cir.1987).[2]

Louisiana has not consented to be sued or waived its immunity from suits brought under 42 U.S.C. § 1983, and the Supreme Court has specifically held that Congress did not abrogate the states' sovereign immunity when it enacted 42 U.S.C. § 1983 (the basis for plaintiff's civil rights claims against the defendants). *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139 (1979); *see also, Will*, 491 U.S. at 71, 109 S.Ct. at 2312 (holding that "neither a State nor its officials acting in their official capacities are "persons" under § 1983"). Accordingly, the Eleventh Amendment

[2] The *Darlak* case discusses the Eleventh Amendment immunity to which the "Department of Health & Human Resources" was entitled. Pursuant to the authority of House Concurrent Resolution No. 59 of the 1999 Regular Session of the Louisiana legislature, "Department of Health and Human Resources" was changed to "Department of Social Services" in subsection C by the Louisiana State Law Institute. Thus, the detailed analysis set forth in *Darlak* is fully applicable here and need not be restated.

bars plaintiff's civil rights claims brought pursuant to § 1983 for monetary relief against the DSS.

*Civil Rights claims against Mitchell, Nelson, & Baras*

Eleventh Amendment immunity extends to state actors or agents when they are sued for monetary relief in their official capacities, because as the Supreme Court has recognized, "a suit against a State official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304 (1989). This conclusion is buttressed by the fact that if a suit against a state agent acting in his or her official capacity is successful, any damages must be paid from public funds in the state treasury. *See Edelman v. Jordan,* 415 U.S. at 663, 94 S.Ct. at 1355. Thus, in the instant case, defendants Mitchell, Nelson, and Baras, sued solely in their official capacities, are merely nominal defendants. The real party in interest is the State of Louisiana, through its arm, the DSS. *Id.*

Accordingly, plaintiff's civil rights claims brought pursuant to § 1983 for monetary relief against defendants Mitchell, Nelson, and Baras are also barred by the Eleventh Amendment, and must be dismissed for lack of subject matter jurisdiction.

*ADA claims*

The vagueness of plaintiff's Complaint makes it impossible for the Court to divine exactly which provision of the ADA plaintiff's suit is premised on, because (as stated above) it is not clear if plaintiff's relationship to

defendants was an employment relationship. Title I of the ADA prohibits discrimination in employment based upon disability;[3] Title II of the ADA prohibits discrimination in the form of exclusion from participation in public services, programs, or activities based upon disability.[4] However, because the Court has assumed for the sake of this motion that plaintiff's relationship with defendants was an employment relationship, it also assumes plaintiff's ADA claim is brought pursuant to Title I of that Act.

In *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955 (2001), the Supreme Court held that states enjoy an Eleventh Amendment immunity from suits for money damages brought under Title I of the ADA. Accordingly, plaintiff's ADA claims against the DSS must be dismissed, and, following the reasoning above premised on *Will/Edelman,* the ADA claims must also be dismissed against nominal defendants Mitchell, Nelson, and Baras in their official capacities.

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[3] Title I of the ADA concerns provides in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

[4] Title II provides in relevant part:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The Court acknowledges that in the event that plaintiff's relationship to defendants is not, strictly speaking, an employment relationship, and that plaintiff can state a valid ADA claim under Title II, this Court would be called upon to determine whether the reasoning in *Garrett* should be extended to Title II cases, but pretermits the question at this juncture because it has assumed an employment relationship.[5]

*Ex Parte Young*

While plaintiff argues that the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) cures the Eleventh Amendment bar to his suit, that doctrine only applies in cases where prospective declaratory or injunctive relief is sought. The face of plaintiff's complaint reveals that no such relief was prayed for against either DSS or the individual defendants, and thus *Ex Parte Young* does not save his claims.

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[5] This would be an issue of first impression in this circuit. *See, e.g., Shaboon v. Duncan*, 252 F.3d 722, 737 (5th Cir.2001), in which the Fifth Circuit explicitly left the question open:

> The Supreme Court recently held that states retain their Eleventh Amendment immunity from suits brought under Title I of the ADA. In so holding, however, the Court declined to consider whether sovereign-immunity shields the states from suits under Title II of ADA. *Coolbaugh [v. State of Louisiana*, 136 F.3d 430 (5th Cir.1980,] would ordinarily remain governing law in this circuit unless the analysis in *Garrett* so plainly applies to Title II suits as to overrule *Coolbaugh* sub silentio. On remand, the Health Science Center may try to persuade the district court of that impact. Since neither party has sufficiently foreseen or briefed the impact of *Garrett*, it is premature for us to decide the issue.

(Internal citations omitted.)

*Rehabilitation Act claims*

Plaintiff has also filed a claim pursuant to the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*

Congress has abrogated the states' Eleventh Amendment immunity to suits brought under the Rehabilitation Act against entities which receive federal financial assistance. 42 U.S.C.A. § 2000d-7(a)(1). While it is not specifically alleged that Louisiana's DSS receives federal financial assistance, the Court considers it highly likely, and at any rate, it is the defendants' burden to establish entitlement to immunity, and they have not carried their burden with respect to the Rehabilitation Act claims. Thus, the Court finds that the defendants do not enjoy an Eleventh Amendment immunity to the Rehabilitation Act claims, and thus they are not subject to dismissal at this juncture based upon any immunity.

Accordingly;

IT IS ORDERED that defendants' Motion for Judgment on the Pleadings to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction (Rec.Doc. 10) is GRANTED IN PART AND DENIED IN PART, and plaintiff's civil rights claims premised on 42 U.S.C. §§ 1981 and 1983 and claims made pursuant to the American with Disabilities Act are hereby DISMISSED without prejudice for lack of subject matter jurisdiction.[6]

[6] Thus, only plaintiff's Rehabilitation Act claims remain.

(2)



No. 05-617

# In the Supreme Court of the United States

LOUISIANA DEPARTMENT OF EDUCATION, ET AL.,
PETITIONERS

*v.*

THEODORE JOHNSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the petitioner state agencies are subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002), because they waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-18) is reported at 421 F.3d 342. The opinion of the panel of the court of appeals (Pet. App. 19-36) is reported at 330 F.3d 362. The opinions of the district court (Pet. App. 37-59, 60-67) are unreported.

### JURISDICTION

The judgment of the en banc court of appeals was entered on August 15, 2005. The petition for a writ of certiorari was filed on November 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

### STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to

discrimination" on the basis of disability. 29 U.S.C. 794. Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a)(2); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damages actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. This petition involves consolidated cases brought by plaintiffs alleging discrimination by the recipients of federal financial assistance in violation of Section 504.

a. *Johnson* v. *Louisiana Department of Education*: Theodore Johnson, who is disabled due to partial paraly-

sis in his left foot, was a full time student at the University of New Orleans (UNO). Pet. App. 37-38. The Veterans' Administration paid for the first two years of Johnson's time at UNO, after which Johnson received financial aid from the University. *Id.* at 38. In February of 2000, Johnson withdrew from UNO due to a medical emergency and provided medical documentation to the University. On June 13, 2000, UNO informed Johnson that he was no longer eligible for financial aid, and required him to file a written appeal from that decision. Johnson ultimately prevailed in his administrative appeal, but the appeals committee imposed certain conditions on Johnson's continued eligibility for financial aid—namely, that he successfully complete 75% of the classes he registered for in the Fall 2000 semester and that he attain at least 2.50 grade point average for the Fall 2000 semester. *Ibid.* Johnson, however, was not notified that he prevailed in his appeal until after the Fall 2000 semester was already underway. Johnson claims that, because of his late start, he was able only to attain a 1.97 grade point average. *Ibid.* Johnson was notified that he was denied financial aid for the Spring 2001 semester and was told that no appeal from that decision was possible. *Id.* at 38-39. Johnson requested that the University accommodate his disability and it refused. *Id.* at 39.

Johnson filed a *pro se* complaint in the United States District Court for the Eastern District of Louisiana, alleging that the University discriminated against him on the basis of his disability in violation of Section 504 of the Rehabilitation Act and various other statutory provisions, and seeking damages. Pet. App. 40. Petitioners moved to dismiss Johnson's claims on various grounds, including Eleventh Amendment immunity. The district

court denied their motion as to Section 504. *Id.* at 49, 59. Petitioners took an interlocutory appeal. *Id.* at 21.

b. *August* v. *Mitchell*: Lynn August, who is blind, was employed as a computer instructor by the Louisiana Department of Social Services. Pet. App. 4, 60. In June 2000, August was fired for failing to submit certain "manual materials," though August alleges that he submitted the materials at the same time as a sighted instructor who was, presumably, not fired. *Id. at* 61. August sued petitioners, the state agency and three state employees in their official capacities, alleging violations of Section 504, as well as several other statutes, and seeking damages. *Id.* at 60, 62. Petitioners asserted Eleventh Amendment immunity to August's Section 504 claim, and the district court rejected that claim. *Id. at* 67. Petitioners filed an interlocutory appeal. *Id.* at 21.

3. The two appeals were consolidated in the Fifth Circuit, after which the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity. On May 5, 2003, a panel of the Fifth Circuit issued its opinion adhering to then-recent circuit precedent in *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir. 2003), holding that the Eleventh Amendment precluded private suits against state entities under Section 504. Pet. App. 19-24. Judge Wiener filed a dissenting opinion disagreeing with the earlier panel's decision in *Pace* and stating his view that the panel in the instant case should have refrained from issuing a decision until after the full court had decided whether to rehear *Pace* en banc. The full Fifth Circuit ultimately granted the rehearing petitions filed by the United States and the plaintiff in *Pace*, 339 F.3d 348

(2003), and later granted rehearing petitions filed by the United States and plaintiffs in the instant case and in one other case, *Miller* v. *Texas Tech Health Sciences Center*, No. 02-10190, raising the same immunity issue.

4. On rehearing en banc, the Fifth Circuit in *Pace* issued its decision on March 8, 2005, holding that the state agency defendant knowingly and voluntarily waived its Eleventh Amendment immunity to claims under Section 504 when it accepted federal funds, and that Section 504 is a valid exercise of Congress's authority under the Spending Clause. *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272, cert. denied, 126 S. Ct. 416 (2005). Relying on this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the court held that "congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive." 403 F.3d at 279. The court noted that the State had not disputed that the Spending Clause statute at issue in the case was "enacted in pursuit of the general welfare" and was "sufficiently related to the federal interest in the program funded." *Id.* at 280. The court proceeded to consider the other requirements for a valid exercise of congressional power under the Spending Clause.

The court held that the conditions on federal spending in Section 2000d-7 are "unambiguous." 403 F.3d at 282. The court explained that "during the relevant time period, [Section] 2000d-7 * * * put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity." *Id.* at 284. The court rejected petitioners' attempt to "engraft[] a subjective-intent element onto the otherwise objective Spending

Clause waiver inquiry," holding that the fact that a State "might not 'know' subjectively whether it had any immunity [left] to waive by agreeing to th[e] [statutory] conditions is wholly irrelevant." *Ibid.* The court concluded that, in light of the unambiguous statutory condition, the State's "waiver of Eleventh Amendment immunity to actions under § 504 * * * was knowing." *Id.* at 285.

The court also held that Section 2000d-7 does not violate any independent constitutional prohibition. The court concluded that the statute does not violate the "unconstitutional-conditions" doctrine, because States as sovereigns, unlike private parties, have the resources to protect their interests and because in any event the need to protect a State from "coercion or compulsion * * * is subsumed in the non-coercion prong of the *Dole* test." 403 F.3d at 286-287. The court also concluded that the conditions in Section 2000d-7 are not unduly coercive. The court noted that, to avoid suit under Section 504, a "state would not have to refuse all federal assistance." *Id.* at 287. Instead, "[a] state can prevent suits against a particular agency under § 504 by declining federal funds for that agency." *Ibid.* The court accordingly "refuse[d] to invalidate Louisiana's waiver on coercion grounds." *Ibid.*

Judge Jones, joined by five other judges, concurred in part and dissented in part. 403 F.3d at 297-303. She agreed with the majority that the Spending Clause statutes at issue in this case are "not unconstitutionally coercive." *Id.* at 299 n.2. But in her view, a State may not be found to have waived its sovereign immunity unless it "possess[ed] actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver.*" *Id.* at 300 (internal quotation marks and citation omit-

ted). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, had purported to abrogate its immunity to claims under that statute. *Id.* at 301. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504. *Ibid.*

This Court recently denied a petition for certiorari filed by Louisiana in *Pace*. See *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005).

5. After issuing its decision in *Pace*, the en banc Fifth Circuit heard oral argument in the instant action, together with *Miller* v. *Texas Tech Health Sciences Center*, No. 02-10190, in order to consider any issues that were not disposed of in *Pace*.[1] On August 15, 2005, the en banc court issued its opinion addressing three remaining challenges to the validity of conditioning the receipt of federal funds on a state agency's waiver of immunity to claims under Section 504.

First, the court of appeals rejected the States' contention that they did not waive their immunity to suits under Section 504 because the agencies that accepted the clearly conditioned federal funds were not autho-

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[1] Although petitioners state (Pet. 7) that the instant action was consolidated with *Miller*, and the en banc Fifth Circuit refers to the appeals as "consolidated," Pet. App. 3, the instant action was never formally consolidated with *Miller*, and Texas—the state defendant in *Miller*—has not filed a petition for certiorari.

rized to waive their immunity, though they were authorized to apply for and accept the conditioned funds. Pet. App. 8-9. The court held that, by authorizing the state agencies to "accept the benefits of substantial sums of federal Spending Clause money burdened with the clearly stated condition under § 2000d-7 that acceptance waives immunity from suit in federal court" for suits under Section 504, the States effectively authorized the agencies to waive their Eleventh Amendment immunity. *Id.* at 9.

Second, the court of appeals rejected Texas's challenge to Sections 504 and 2000d-7 on "relatedness" grounds. Pet. App. 10-13. Texas argued that, because the federal funds its agency received were not funds provided directly under the Rehabilitation Act itself, the conditions in Sections 504 and 2000d-7 are not "reasonably related to the purpose of the expenditure to which they are attached" as required by the *Dole* test. See Pet. App. 10 & n.15. The court rejected that contention, holding that Congress's interest in "eliminating disability-based discrimination" in federally-funded programs "flows with every dollar spent by a department or agency receiving federal funds." *Id.* at 12 (quoting *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003)). Petitioners in the instant case did not raise a relatedness challenge in the court of appeals.

Finally, the court of appeals rejected petitioners' argument that it did not "knowingly" waive its immunity by accepting federal funds because it might have thought at the time it took the funds that it did not have any immunity to waive. Pet. App. 13-17. Although petitioners acknowledged that the en banc court had rejected the same "no knowing waiver" argument in *Pace*,

it argued that this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), required the court to reconsider *Pace*. According to petitioners, this Court in *Jackson* "repudiated th[e] 'clear statement rule' and replaced it with a 'notice' rule," under which a State will not be found to have waived its sovereign immunity based on particular conduct unless it should have known that accepting the funds would subject it to liability for engaging in that conduct. Pet. App. 14-15. The court of appeals noted that nothing in *Jackson* "can be pointed to in support of a conclusion that the Court desired to modify, much less repudiate, the well-established [clear statement] rule." *Id.* at 16. The court held instead that, consistent with long-standing precedent, the "clear and unambiguous" waiver condition in Sections 504 and 2000d-7 was sufficient to render a State's acceptance of federal funds a knowing waiver of immunity. *Ibid.*

Judge Jones, joined by five other judges, concurred in part and dissented in part. Although they agreed with the three holdings of the *en banc* court in this case, they reiterated their disagreement with the court's decision in *Pace*. Pet. App. 17-18.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court nor implicate any conflict of continuing significance with any other court of appeals. In addition, this Court recently denied certiorari in a case presenting the identical questions presented here. *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005) (No. 04-1655). There is no reason for a different result here. Further review is not warranted.

1. This Court has frequently denied petitions for certiorari raising arguments indistinguishable from those advanced by petitioners. See *WMATA* v. *Barbour*, 125 S. Ct. 1591 (2005) (No. 04-748); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Pennsylvania Dep't of Corr.* v. *Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). Moreover, on October 11, 2005, this Court denied the State's petition for certiorari in *Pace*.

On November 11, 2005, petitioners filed the instant petition for certiorari. Apart from a few minor differences in wording, the instant petition is identical to that filed in *Pace*. Compare, *e.g.*, Pet. 8-9 (Reasons for Granting the Writ) and 30 (Conclusion) with 04-1655 Pet. at 8-9 (Reasons for Granting the Writ) and 30 (Conclusion). Nothing has changed in the few months since this Court denied certiorari in *Pace* that would warrant any different result here. Accordingly, for the same reasons that the Court has previously denied further review in *Pace* itself and in cases from other circuits, and for the reasons given in the government's Brief in Opposition in *Pace*, further review is not warranted here.

2. Petitioners do not dispute that the language of Section 504 makes clear that a State agency may accept federal funds only if the State waives the agency's sovereign immunity for claims under Section 504. Conditioning receipt of federal funds on a State agency's waiver of sovereign immunity to suit under Section 504 does not

impose an unconstitutional condition on the State. See Pet. 9-18.

This Court has made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985). Cf. *Petty* v. *Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275, 277, 281-282 (1959). No court of appeals—indeed, none of the appellate judges (including the concurring and dissenting judges in this case) who have questioned the applicability of Section 504 to the States on other grounds—has suggested that Section 504 is invalid as applied to the States under the reasoning of this Court's unconstitutional conditions cases. See Pet. 11 n.26 (citing appellate cases upholding Section 504 and dissenting opinions). See generally 04-1655 Br. in Opp. at 11-15.

3. Petitioners erroneously argue (Pet. 18-25) that the conditions Congress placed upon the receipt of federal funds by enacting Section 504 are unconstitutionally coercive. Although petitioners claim that the courts of appeals have adopted varying approaches to determining whether federal Spending Clause statutes are unconstitutionally coercive, the differences are largely ones of verbal formulation rather than real substance. Petitioners do not cite a single case in which a court of appeals has applied the coercion test to invalidate *any* federal statute, let alone the statute at issue in this case. This Court has consistently rejected similar challenges to other statutes. See also *Lau* v. *Nichols*, 414 U.S. 563,

569 (1974) (rejecting similar challenge to VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984) (rejecting similar challenge to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*).

This Court noted in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). In *Steward Machine* itself, however, the Court expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Moreover, the Court in *Dole* also recognized that every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 589). As the Court explained, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 589-590). In *Dole*, the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* The same conclusion is applicable here. See generally 04-1655 Br. in Opp. at 15-17.

4. Finally, petitioners' waiver of sovereign immunity to suits under Section 504 was valid and knowing. See Pet. 25-30. The fact that petitioners may have subjectively believed that Congress had validly abrogated the State's immunity to suit under a different statute—Title II of the Americans with Disabilities Act of 1990, 42

U.S.C. 12131 *et seq.*—did not provide the State with a license both to accept federal funds clearly conditioned upon a waiver of immunity to suit under Section 504 and to deny that it had waived immunity from suit under Section 504. Since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. As in other contexts, what must be known for a valid waiver of sovereign immunity to claims under Section 504 is the existence of the legal right to be waived and the direct legal consequence of the waiver, not the practical implications or costs of waiving the right.[2] A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity it might have to suit under Section 504, regardless of whether it believed that Congress had abrogated its immunity to liability under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a

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[2] See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); see also *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (internal quotation marks omitted); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

claim-by-claim basis).' The State's subjective beliefs about the practical value of its immunity to suit under Section 504 are of no relevance in the analysis.[3] See generally 04-1655 Br. in Opp. at 17-23.

Petitioners err in arguing that the court of appeals' determination that the State's waiver of its immunity was knowing and voluntary conflicts with this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005). The Court held in *Jackson* that recipients of federal funds should have understood that the term "sex discrimination" in Title IX of the Education Amendments of 1992 encompassed retaliation against those who complain of violations. In reaching that conclusion, the Court reiterated the principle that recipients of conditioned federal funds may be sub-

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[3] Citing *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), petitioners contend (Pet. 28) that "[t]he Circuit Courts of Appeal are split on the proper analysis to employ in determining whether a state has notice of waiver requirements." There is no direct or continuing conflict created by *Garcia*. That case held that a State did not waive immunity to suit under Section 504 when it accepted federal funds under the mistaken belief that its immunity to suit under the ADA had been abrogated. *Garcia* was mistaken when issued, and it in any event has been effectively overridden by this Court's subsequent decisions in *Lapides* v. *Board of Regents of University System*, 535 U.S. 613, 621 (2002), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004). See 04-1655 Br. in Opp. at 21. In addition, the decision in *Garcia* essentially announced a transitional rule that is of no continuing effect; the court recognized that the State's waiver to suits under Section 504 may well have regained its full effectiveness at some point in the late 1990's, when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. See *Garcia*, 280 F.3d at 114 n.4. See also 04-1655 Br. in Opp. at 22-23. For future cases, it would appear that the Second Circuit would agree with all other circuits that acceptance of federal funds waives sovereign immunity to suit under Section 504.

ject to suits for damages for conduct in violation of a Spending Clause statute only if the recipients "had adequate notice that they could be liable for the conduct at issue." *Id.* at 1509 (quoting *Davis ex rel. LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). The court of appeals faithfully applied that principle in the instant case when it held that, because the federal funds accepted by petitioners were clearly conditioned upon a waiver of petitioners' immunity, petitioners were put on adequate notice that they would not be immune to claims under Section 504 if they accepted federal funds.

Thus, the decision of the court of appeals is entirely consistent with the analysis and result in *Jackson*. In any event, *Jackson*, a Title IX case, had no occasion to consider the specific issues presented here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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